Supreme Court of the United States

October Term, 1972

No. 70-278

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

FLORIDA EAST COAST RAILWAY COMPANY
AND
SEABOARD COAST LINE RAILROAD COMPANY,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLEE
SEABOARD COAST LINE RAILROAD COMPANY

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This Brief is filed on behalf of Appellee, Seaboard Coast Line Railroad Company, hereinafter referred to as Seaboard Coast Line.

OPINION BELOW

The opinion of the District Court (J.S. App. 1a-48a)[1] is reported at 322 F.Supp. 725.

[1] J. S. App. refers to the appendix to Appellants' Jurisdictional Statement.

JURISDICTION

The judgment of the District Court (J.S. App. 16a), entered on February 18, 1971, set aside and enjoined the order entered by the Interstate Commerce Commission in an administrative proceeding identified as Ex Parte No. 252 (Sub-No. 1), *Incentive Per Diem Charges—1968,* 337 I.C.C. 217 (J.S. App. 85a-114a). Notices of appeal were filed by the Interstate Commerce Commission and the United States on April 15, 1971. (J.S. App. 115a-118a.) Probable jurisdiction was noted by this Court on June 12, 1972. (App. 206).[2] The jurisdiction of this Court rests on 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether the proceedings here under review are governed by the provisions of Sections 556 and 557 of the Administrative Procedure Act; and

2. Whether the parties to the Interstate Commerce Commission proceeding received the protection afforded by the Administrative Procedure Act and the Interstate Commerce Act.

STATUTES INVOLVED

The pertinent statutes involved are: Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), and Sections 553(c), 556(d) and 706 of the Administrative Procedure Act, 5 U.S.C. §§ 553(c), 556(d) and 706. (Appendix A hereto)

STATEMENT

Each railroad pays a rental charge, called per diem, for its use of any kind of rail car owned by another railroad.

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[2] App. refers to the Joint Appendix to Briefs filed with this Court.

The purpose of per diem is to compensate the owning railroad for its car ownership costs.

The proceeding now before this Court relates to *incentive* per diem, which is an additional charge over and above regular per diem. Its stated purpose is to give railroads an incentive to promptly move cars and to acquire new ones. As prescribed by the Commission in the disputed decision, incentive per diem would apply to only one kind of railroad boxcars, plain boxcars.

A. Proceedings Before the Commission

The Commission's authority to impose incentive per diem is found in Section 1(14)(a) of the Interstate Commerce Act.[1] The "incentive" provisions of that section were enacted by Congress in 1966 (Public Law 89-430) and, later that year, the Commission began an investigation into the possibility of prescribing incentive per diem charges. The following year, on October 3, 1967, being without facts sufficient to warrant the imposition of incentive charges, it discontinued the proceeding. That was done in *Incentive Per Diem Charges,* 332 I.C.C. 11 (1967), a decision which will sometimes be referred to as "the 1967 decision."

Later in the year, on December 15, 1967, the Commission published a notice requiring all railroads to participate in a study of rail car supply and demand by submitting data in response to a questionnaire. Then, on December 12, 1969, without having held hearings, and with only raw statistical data of a limited nature in hand, the Commission handed down a decision, described as an "interim report," in *Incentive Per Diem Charges—1968,* 337 I.C.C. 183 (J.S. App. 51a-84a). That decision "announced a provisional judgment with respect to the form and amount" of incentive per diem

[1] Reproduced at pages 3-4 of the Appellants' brief.

charges to be added to the regular per diem charges, but the payments were to be applicable only to "plain," or "unequipped," boxcars. The parties were permitted to comment upon the Commission's "interim report" by means of statements or briefs and, on April 28, 1970, the Commission handed down a final order which adopted all of the material "provisional" conclusions reached in its "interim report."[4]

The decision of April 28, 1970, is found in *Incentive Per Diem Charges—1968,* 337 I.C.C. 217 (J.S. App. 85a-114a), and, while it is that decision and order which is the subject of this proceeding, it is founded upon, and is virtually the same as, the "interim report."

The final decision prescribed an experimental plan by which the Commission thought that it might improve the utilization, and the size, of the railroads' plain boxcar fleet through so-called incentive payments.

B. The Action in the Court Below

In June 1970, both the Seaboard Coast Line and the Florida East Coast Railway Company (FEC) filed complaints seeking to enjoin, annul and set aside the order of the Interstate Commerce Commission, dated April 28, 1970, in *Incentive Per Diem Charges—1968,* 337 I.C.C. 217.

Upon motion of the FEC and of the Seaboard Coast Line, which had shown that it would lose some 1.8 million dollars annually because of the Commission's experiment, a temporary restraining order was granted. Subsequently, the District Court set aside the order insofar as it affects the Seaboard Coast Line and the FEC because of the Commission's failure to hold necessary hearings.

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[4] Appellants' brief, p. 9.

In the meanwhile, a United States District Court in New York had handed down a decision related to the Commission's April 28, 1970, order in *Long Island Railroad Company* v. *United States,* 318 F.Supp. 490 (D.C.N.Y. 1970) (J.S. App. 119a-138a). By stipulation in that case, however, there was only one issue presented, and it had been made quite narrow; that is, the only question before the New York court was whether, in the absence of the Long Island's failure to point to "specifics" related to the need for a hearing, and since the Long Island did not put the Commission on notice that prejudice would result absent a hearing, an oral hearing was required.[5] The court found that Section 556 of the Administrative Procedure Act governed, but that the Long Island had failed to show why it needed the hearing.

C. The Positions of the Parties Here

The Commission's Jurisdictional Statement urged that the questions before this Court are substantial for two reasons;[6] the first being that the District Court's decision, if allowed to stand, will disrupt the "incentive" experiment before it has been given a fair trial;[7] and the second being that the action of the court below conflicts with the related lower court decision in *Long Island.* It went on to urge that the District Court was wrong because the Appellees are said not to have been prejudiced by the ICC's handling of the proceeding; and because the lower court "failed to assess the likely impact that the matters allegedly requiring an oral hearing would have had upon the Commission's conclu-

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[5] *Long Island Railroad Company* v. *United States,* 318 F. Supp. 490, 499-500 (D.C. N.Y. 1970) (J.S. App. 136a-138a).

[6] Jurisdictional Statement, pp. 13-15.

[7] That reason now seems to have been abandoned, presumably because the rules have been in effect for 2 years.

sions." Further, said the Commission, "it is extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order." [8]

Although the Commission's Jurisdictional Statement was based upon the assumption that Sections 556 and 557 of the Administrative Procedure Act governed its action throughout this proceeding, it now says that, since the "incentive" language in Section 1(14)(a) of the Interstate Commerce Act does not explicitly or impliedly require a hearing "on the record," the provisions of 5 U.S.C. §§ 556 and 557 do not govern here.[9]

Appellee Seaboard Coast Line says, on the other hand, that the Commission's proceeding under review is governed by the provisions of Sections 556 and 557 of the Administrative Procedure Act, and that the Commission was wrong in using, as the lower court phrased it, a "procedural shortcut." A proper hearing should have been held, and whether or not the Seaboard Coast Line was *likely* to have "affected the Commission's ultimate order" is not the point. Rather, it was entitled to the protection of its procedural rights, and their denial here, in favor of the Commission's desire to still criticism from Congressmen who were "impatient with delays," [10] prejudiced both the Seaboard Coast Line and the shipping public which it serves. The court below was correct in finding that the Commission acted illegally.

Further, though the District Court did not reach these issues,[11] the Commission did not properly apply the provisions of Section 1(14)(a) of the Interstate Commerce Act, did not give sufficient reasons for its conclusions as

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[8] Jurisdictional Statement, p. 15.

[9] Appellants' brief, pp. 14, 19.

[10] Jurisdictional Statement, p. 6.

[11] *Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 728 (D.C. Fla. 1971) (J.S. App. 5a).

required by Section 557 of the Administrative Procedure Act, and, contrary to the mandate of Section 706 of the Administrative Procedure Act, acted arbitrarily and had no substantial evidence of record to support conclusions in the disputed decision which were at complete variance with its conclusions in the 1967 decision.

SUMMARY OF ARGUMENT

In its 1967 decision, the Interstate Commerce Commission concluded that the evidence of record showed that:

> "(1) present operating practices would not be improved (2) nor would more effective use be made of freight cars (3) nor would the building of more freight cars be generated as a result of applying an interim incentive charge." [12]

Without any evidence to warrant a change in that conclusion, the Commission changed its mind and prescribed the "experimental" [13] per diem now under attack.

There is no quarrel here with the proposition that the Interstate Commerce Act invests the Commission with extensive authority with respect to car service rules and practices. In emergencies involving car shortages, the Commission may call upon Section 1(15) of the Act, and is expressly authorized there to proceed summarily, "without * * * hearing" if necessary.[14] Here, however, the Commission proceeded under Section 1(14)(a), and the first sen-

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[12] *Incentive Per Diem Charges,* 332 I.C.C. 11, 16 (1967).

[13] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 187 (1969) (J.S. App. 55a).

[14] "Summarily," that is, said the Commission's General Counsel, "on every element except the element of compensation to be paid for the use of the cars." *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 730 (D.C. Fla. 1971) (J.S. App. 11a).

tence of that section permits car-service action only "after hearing."

The additonal burden placed on the Commission in 1966 by Public Law 89-430, which is the language found in the second and third sentences of Section 1(14)(a), distinguishes this "compensation" proceeding from that considered in the recent *Allegheny-Ludlum Steel* decision[15] involving operational rules of general application. The intent of Congress is clear. Where "compensation" is involved, the second and third sentences permit decision only after the Commission has weighed many factors; and, still more, in fixing an "incentive element"—that is, where, as here, there is the shifting of millions of dollars between carriers—additional "considerations" are required by Section 1(14)(a) to be evaluated. Only then may the Commission make its decision, and, to use the language in the second sentence of Section 1(14)(a), the decision must be *"on the basis of such consideration."*

In going about its regulatory business, including its consideration of car problems, the Commission is entitled to call upon its experience. But, this Court has warned on several occasions that the Commission will not be permitted to flaunt its "administrative expertise" in such a way as to become "a monster which rules with no practical limits on its discretion."[16] "That," said the Court, "is impermissible under the Administrative Procedure Act."[17] "Lax procedure" cannot be sanctioned, and, where the Commission's

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[15] *United States* v. *Allegheny-Ludlum Steel,* U.S. 32 L Ed 2d 453 (1972).

[16] *Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.,* 393 U.S. 87, 92 (1968); *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167 (1962).

[17] *Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.,* 393 U.S. 87, 92 (1968).

handling of a proceeding is deficient, the Court will not "bridge the gap by blind reliance on expertise."[18]

This requirement as to procedural safeguards does not now come as news to the Commission. In its initial order in this very proceeding, the Commission carefully noted that it would proceed under authority of "particularly * * * the Administrative Procedure Act (5 U.S.C. 553, 556 and 557)." Earlier, in its 1967 decision the Commission said:

> "Section 1(14)(a) differs from Section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. § 551, et seq."

And still earlier, Congress had been promised, so far as the second and third sentences of Section 1(14)(a) are concerned, that:

> "* * * if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates."[19]

In *Long Island* it even stipulated that the protection of those three sections was a jurisdictional prerequisite.[20] As late as its Jurisdictional Statement here, the Commission continued to press forward in the belief that the proceeding was governed by the Administrative Procedure Act, including Sections 553, 556 and 557. It seems to us, then, that since the I.C.C. was responsible for the passage of Public Law 89-430, some weight should be attached to its interpretation of the language.

Nor should the applicability of the full protection of the Administrative Procedure Act surprise the office of the

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[18] Id., pp. 92, 95.

[19] *Incentive Per Diem Charges*, 332 I.C.C. 11, 14 (1967).

[20] *Long Island Railroad Company* v. *United States*, 318 F.Supp. 490, 491, n.2 (D.C.N.Y. 1970) (J.S. App. 119a-120a).

Solicitor General. For it supported the Commission's reliance upon Sections 553, 556 and 557 in the court below, as well as before the New York court in *Long Island* which agreed with them.[21] And, the Attorney General's Manual on the Administrative Procedure Act (1947),[22] page 34, tells us that:

> "It appears, therefore, that rules (as defined in section 2(c)) which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies Act on the basis of the evidence adduced at the agency hearing, must be regarded as 'required by statute to be made on the record after opportunity for an agency hearing.'"

The second and third sentences of Section 1(14)(a) plainly show the need for a record.

Many sections of the Interstate Commerce Act specifically permit the processing of matters without hearing. But, Section 1(14)(a) is not one of them; it requires a hearing, and this Appellee did not receive one, either on the record or off. Not only does it not know what evidence was considered, but it knows that conclusions were reached without supporting evidence, and that it was not given an opportunity to test the grounds for the ICC's decision. Whether or not this Court desires to hold the Commission to its promise that "extreme caution" would be exercised in "incentive" proceedings, the Court, nevertheless, ought to remind the Commission that it considers "there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."[23]

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[21] *Long Island Railroad Company* v. *United States*, 318 F.Supp. 490, 497 (D.C. N.Y. 1970) (J.S. App. 131a).

[22] To which appellants refer at pages 17-18 of their brief.

[23] *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 93 (1913).

Had the procedural protection of the Administrative Procedure Act been afforded, the Seaboard Coast Line would have had its opportunity to show, not only the harm which it would experience, but the reasons why the rules under attack will not do the intended job, are not reasonable, and, instead, are arbitrary, not rationally supported by evidence, and, in fact, contrary to such evidence as is presently found on the record.

ARGUMENT

Appellee believes that, basically, the Court will simply want to know whether, in this proceeding, "the announced grounds for the agency decision comport with the applicable legal principles."[24] We urge that they do not.

Throughout this proceeding, the Seaboard Coast Line has taken the position that the Commission ignored the requirements of the Administrative Procedure Act, failed to give it a proper hearing, and that such failure was damaging to it. That position has ample support in law and in fact, and the Commission's brief fails to shake it. Therefore, we argue that the court below was correct in its conclusion.

A. The Wording of Section 1(14)(a) Confirms that these Proceedings Are Governed by the Provisions of Sections 556 and 557 of the Administrative Procedure Act.

Section 1(14)(a) of the Interstate Commerce Act is comprised of three sentences, the first of which is part of the Esch Car Service Act. That sentence invests the Commission with the authority to take specified action with respect to car service matters, but only "after hearing." So, some kind of "hearing" is necessary. And, it "must be a hearing

[24] *City of Portland* v. *United States*, U.S. , 40 L.W. 5091, 5101, June 27, 1972.

in a substantial sense."[25] This Court has said that, at least, where a hearing is required it will not let the Commission "capriciously make findings by administrative fiat"; that "the Commissioners cannot act upon their own information"; that the parties must be permitted to "test the sufficiency of the facts"; and, again, that "there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."[26] The Commission did not even clear that minimum requirement.

But, had it done so, it still would have foundered on Public Law 89-430, the next two sentences of Section 1(14)(a) which comprise the incentive per diem legislation of 1966. Those sentences were designed by Congress especially for the type of proceeding which is the subject of this action, and they contain the crucial language here. They say that, where "compensation," including an "incentive element or elements of compensation," is involved, the Commission

> *"shall give consideration"*

to specified factors,

> *"and shall, on the basis of such consideration"* (Emphasis added)

reach certain determinations as to car service compensation.

As this Court said only recently in *Allegheny-Ludlum Steel*,[27] the precise words "on the record" need not be used in order to bring Sections 553(c), 556 and 557 into play.

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[25] *Morgan* v. *United States*, 298 U.S. 468, 481 (1935).

[26] *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U.S. 88, 91, 93 (1913).

[27] *United States* v. *Allegheny-Ludlum Steel*, U.S. , 32 L Ed 2d 453, 465 (1972).

In fact, those words are not used once in the some 72 sections and subsections of the Interstate Commerce Act which are concerned with hearings. But, the words *"on the basis of such consideration"* plainly mean that the Commission must reach its conclusion only after it has considered, at least, the certain facts required to be collected by Section 1(14)(a). An extra burden is placed upon the Commission where, as here, the facts are in dispute.[28]

At pages 18-19 of its brief, the government is willing to go so far as to concede that the words "on the record" can be "inferred from" or "implied by" the statute. We agree. But, we also say that there is no need to "infer" or "imply" here; the requirement of Section 1(14)(a) is clear.

Summarizing, Section 553(c) of the Administrative Procedure Act permits the Commission to engage in rulemaking "without opportunity for oral presentation" only if the proposed rules are not "required by statute to be made on the record after opportunity for an agency hearing." If the involved statute compels a hearing, with the Commission being permitted by Congress to reach its conclusion, as in Section 1(14)(a), only after considering evidence of a described nature, then subsection 553(c) tells that:

> "* * * sections 556 and 557 of this title apply instead of this subsection."

Appellee Seaboard Coast Line urges that the language of Section 1(14)(a) *is* clear, and that Sections 556 and 557 of the Administrative Procedure Act govern this proceeding.

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[28] 1 K. Davis, Administrative Law Treatise, §7.01, p. 411 and §7.02, pp. 412-415.

B. Congress Intended to Give the Protection of Sections 556 and 557 of the Administrative Procedure Act to Incentive Per Diem Proceedings.

The car-service provisions of the Interstate Commerce Act were added by the act of May 29, 1917, popularly known as the Esch Car Service Act.[29] That act "was passed in substantially the form recommended by the Commission."[30] Under its terms, and those of the subsequent Transportation Act of 1920 and a 1940 amendment, the Commission was authorized to lay down reasonable rules, regulations, and practices with respect to car service. Insofar as the present Section 1(14)(a) is concerned, only the first sentence was in existence until 1966.

The recent controversy in *Allegheny-Ludlum Steel* related to the Commission's powers under the Esch Car Service Act;[31] that is, to the authority found in the first sentence of Section 1(14)(a) of the Interstate Commerce Act. When, in 1947, the Commission sought to use that authority to exert "economic pressure" on non-owning railroads (to apply incentives), it was told in *Palmer* v. *United States:*

> "That is not the scheme of this statute. The statutory plan is that the interchange and return of cars are to be controlled by regulations designed and directed to that purpose,—operating regulations. And the rentals for cars, under whatever system of use and return may be established by the Commission, are to be reasonably compensatory for that use, and no more."[32]

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[29] *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328, 340 (1935).

[30] "The Interstate Commerce Commission," I. L. Sharfman, Vol. I, at 146 (1931).

[31] *United States* v. *Allegheny-Ludlum Steel,* U.S. , 32 L Ed 2d 453, 458 (1972).

[32] *Palmer* v. *United States,* 75 F.Supp. 63, 69 (D.C.D.C. 1947).

As a result of *Palmer*, and lacking the authority in the Esch Car Service Act to exert economic pressure in the form of incentive payments, the Commission for several years made annual recommendations to the Congress that it be permitted to assess penalties, or, in the alternative, incentive per diem, charges.[33] During the 18 years following *Palmer*, several bills were introduced in the Senate and in the House, and, finally, in 1966, Congress passed Public Law 89-430, giving to the Commission the authority now found in the second and third sentences of Section 1(14)(a) of the Interstate Commerce Act.

The legislative history, which is discussed next, shows why the Commission would say in its 1967 decision that it must consider the many factors noted in the second and third sentences and, "on the basis of such consideration," reach its conclusions; the Commission emphasizing, further:

> "There is a substantial difference, however, between the information which warrants the issuance of orders requiring the movement of empty cars to an area of current scarcity and that which will support an order for the payment of funds by and between the respondent railroads. Section 1(14)(a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 USC § 551 et seq."[34]

Reminded that this Court said in *Allegheny-Ludlum Steel* that it would "not suggest that only the precise words 'on the record' in the applicable statute will suffice to make §§ 556 and 557 applicable,"[35] there is ample legislative sup-

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[33] *Hearings Before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce*, 89th Congress, 1st Session, Ser.89-23, at 4, 8-9, 14, 65, 201 (April 7-21 1965).

[34] *Incentive Per Diem*, 332 I.C.C. 11, 12, 14 (1967).

[35] *United States* v. *Allegheny-Ludlum Steel*, U.S. , 32 L Ed 2d 453, 465 (1972).

port for the Commission's recognition in its 1967 decision that the statutory language "on the basis of such consideration" [36] means that the ICC is required to record given facts and to make its decision on the basis of that record.

At the beginning of the Senate hearings which led to the passage of Public Law 89-430, the Chairman of the Interstate Commerce Commission, Commissioner Webb, told the Senate Committee on Commerce:

> "If the proposed legislation is enacted, the Commission's first step would be to determine the extent to which particular railroads are deficient in car ownership. Some of the information required for such a determination is being developed in *Ex parte No. 241.*
>
> "This proceeding was instituted by the Commission on December 20, 1963, to obtain specific and current information on the adequacy of freight car ownership and to formulate, if possible, more effective rules for the alleviation of car shortages. The first phase of this proceeding, which has been completed, indicates that inadequacy of ownership is not confined to any one particular type of freight car.
>
> "A conclusive determination of the extent to which railroads are deficient in car ownership, such as would be required under the proposed legislation, would involve a comprehensive study of traffic requirements, including peak loadings. Separate studies would be required for particular types of equipment, such as box, gondola, flat, hopper, refrigerator, stock, and the other special types of cars. In addition, it would be necessary to consider the type and flow of traffic and whether the carrier in question is predominantly an originating, terminating, or bridge line.
>
> "It should be emphasized that large net per diem debits do not necessarily indicate that the debtors are deficient in car ownership. Some railroads which supply great numbers of cars to the interchange fleet are net per

[36] 49 U.S.C. § 1 (14) (a), reproduced in Appendix 1a.

diem debtors. Other railroads terminate so much more traffic than they originate that they would be substantial net per diem debtors, even if they owned more cars than they needed.

"Conversely, it is conceivable that railroads which consistently show net per diem credits may not own enough freight cars of a particular type.

"Accordingly, if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates. We recognize that an indiscriminate increase in the number of freight cars would result in an uneconomic surplus of cars of various types and would result in wasteful transportation practices." [37]

The same promise of "extreme caution" was made by Chairman Webb to the House Committee on Interstate and Foreign Commerce.

"Accordingly, we believe that the Commission should be clearly authorized to established per diem charges at a level or levels that would make ownership of equipment more attractive. The Commission should not be prevented from fixing per diem charges which would, in the language of the bills under consideration: '* * * provide just and reasonable compensation to freight car owners, contribute to sound car service practices and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.'

"It should be emphasized that large net per diem debits do not necessarily indicate that the debtors are deficient in car ownership. Some railroads which supply great numbers of cars to the interchange fleet are net per diem debtors.

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[37] *Hearings Before the Freight Car Shortage Subcommittee of the Senate Committee of Commerce,* 89th Congress, 1st Session, Ser. 89-23, at 14 (April 7, 1965).

"Other railroads terminate so much more traffic than they originate that they would be substantial net per diem debtors even if they owned more cars than they needed.

"Conversely, it is conceivable that railroads which consistently show net per diem credits may not own enough freight cars of a particular type.

"We recognize that an indiscriminate increase in the number of freight cars could result in an uneconomic surplus of cars of various types and in wasteful transportation practices. Accordingly, if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates."[38]

Once again, before the House Committee, the Commission's Chairman, promised great care and emphasized the part hearings would play in developing a record:

"In addition, I would like to point out that no sudden change in per diem charges would be effected by the proposed legislation. Section 1(14) of the act, as proposed to be amended, provides for hearings. The Commission's decision, after hearings, would be subject to judicial review.

"Hearings would be necessary in any event to determine, among other things, deficiencies by type of cars and by carriers, and the most equitable means of correcting these deficiencies.

"A comprehensive study of traffic requirements, including peak loadings, would be necessary. Separate studies would be required for particular types of equipment, such as box, gondola, flat, hopper, refrigerator, and other special types of cars.

"In addition, it would be necessary to consider the type and flow of traffic and the extent to which par-

[38] *Hearings Before the House Committee on Interstate and Foreign Commerce,* 89th Congress, 1st Session, Ser. 89-26, at 45 (October 5, 1965).

ticular carriers are originating, terminating, or bridge lines.

"In fixing the compensation to be paid for the use of freight cars, the Commission would have to determine what basis of compensation would provide a fair return on investment to freight car owners, contribute to sound car service practices, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

It would be necessary for us to determine whether the compensation should be computed on the basis of elements of ownership costs involved in owning and maintaining freight cars including a fair return on investment, whether compensation should include an element reflecting the value of use of freight cars, or whether it should be fixed upon some other basis or combination of bases.

"It would also be necessary to determine whether to prescribe incentive per diem rates industrywide, or to prescribe separate incentive rates for individual carriers by type of car."[39]

The Chairman of the Senate Committee, Senator Magnuson, told the House Committee:

> "I would like to make a start, and I would like the ICC in its wisdom, with proper hearings for these people [the railroads], with their problems—and they have problems, financial and otherwise—to be able to make a start on this, * * *."[40]

Throughout the hearings on Public Law 89-430, the Congress was given every reason to believe that the Commission would consider the many factors involved in deciding upon

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[39] Id., pp. 45-46.

[40] Id., p. 13.

a proper incentive. Congressman Meeds remarked, for example:

> "The Interstate Commerce Commission has assured us that upon the passage of this legislation, they would make a thorough investigation to determine the problems which will be involved, and none of us here, certainly want to mitigate the seriousness of this problem to the railroads, either.
>
> While it has been called a sectional problem, it is obviously a serious problem in which many factors have to be considered." [42]

And, Congressman Mize said:

> "A bill, S. 1098, has passed the Senate. It carries incentive amendments which should be included. There are some particular problems with respect to the terminal lines which must be recognized. We also must take into account those railroads which are doing a good job in maintaining an adequate fleet of freight cars. The Interstate Commerce Commission can take these items into consideration in setting realistic rates for freight car rental." [43]

When the Chairman of the House Committee questioned the Chairman of the Interstate Commerce Commission, this was noted:

> "The Chairman. If this additional authority that is given to you should be approved, would it permit you to start a program of at least providing an incentive, or encouragement for these cars to be constructed?
>
> "Mr. Webb. Yes, Mr. Chairman. I assure you that we would begin immediately with our investigation, with hearings, with a view toward finding what level of

[42] Id, p. 30.

[43] Id, p. 34.

rates would be best designed to encourage car ownership."[44]

A reading of the many pages of legislative history leaves absolutely no doubt that both the Congress and the Commission intended the exercise of extreme care in the prescription of incentive charges. And, when the Senate Committee reported out the proposed legislation, it was accompanied by a report which, among other things, noted:

> "The major purpose of S 1098 is to insure the adequacy of the national railroad freight car supply. This objective is to be attained, not by arbitrary Government action, but by authorizing and directing the Interstate Commerce Commission, after hearing, to prescribe freight car rental charges (per diem)...."[45]

Even after the enactment of Public Law 89-430, the Chairman of the Commission and the agency's General Counsel continued to express the Commission's understanding that, where compensation is involved, summary procedures will not do. One such occasion was an appearance before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, and some of that testimony was reprinted in the decision of the court below.[46] We won't repeat it here, but it makes clear the fact that summary procedures may be used under Section 1(15) of the Interstate Commerce Act, but that, where incentive compensation to be paid for the use of cars is involved, a full hearing is contemplated under Section 1(14)(a).

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[44] Id., p. 60.

[45] *Report of the United States Senate Committee on Commerce to Accompany S. 1098,* Report No. 386, 89th Congress, 1st Session, at 4 (June 30, 1965).

[46] *Florida East Coast Railway Company* v. *United States,* 322 F. Supp. 725, 729-732 (D.C. Fla. 1971) (J.S. App. 9a-15a).

We might note here that it is almost unreal for the government now to say[47] that credence cannot be given to testimony of Commissioners or their general counsel. And, surely, the two citations given by the government in support of that proposition are inapposite and lend no support whatsoever.

As following sections of this brief will illustrate, the Commission continued to believe in the need for fact-gathering hearings throughout the proceedings reported in the 1967 decision.

C. Consideration Should Be Given to the Fact that the Commission Has Never Doubted that Sections 556 and 557 Govern Here.

Until the writing of its brief this month, the Interstate Commerce Commission never once expressed doubt as to the applicability of Sections 556 and 557 of the Administrative Procedure Act to incentive per diem proceedings. While not determinative, this Court has given "great weight" to agency interpretations, and "the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."[48]

Some five years ago, when it first considered the imposition of an incentive per diem under the then-new Section 1(14)(a), the Commission held oral hearings, had the benefit of briefs, and even heard oral argument. It did so, as it said in the very first sentence of its 1967 decision, because the new legislation of 1966 required the consideration of specified factors and because the Commission decision had to be reached "on the basis of such consideration."[49] And, it did so because, as it said, it recognized that "all the re-

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[47] Appellants' brief, pp. 21-22, n. 6.

[48] *United States* v. *American Trucking Associations,* 310 U.S. 534, 549 (1940).

[49] *Incentive Per Diem Charges,* 332 I.C.C. 11, 12 (1967).

quirements of due process provided by the Administrative Procedure Act, 5 U.S.C. § 551 et seq." are applicable.[50] Finding, *"upon consideration of the record herein"* in the 1967 decision that the facts did not warrant the prescription of incentive charges, the Commission took care to point out that:

> "Any alteration in the costs of transportation services, any diminution in their availability, produces repercussions throughout the entire structure. Thus, before we undertake to impose the charge authorized by P.L. 89-430, it is of the utmost importance that little, if any, doubt exist as to its necessity and effectiveness. As a former Chairman of this Commission observed before the Senate Freight Car Shortage Subcommittee in 1965, '* * * if the proposed legislation were approved, the Commission would exercise extreme caution in setting incentive per diem rates.' *Hearings on S.179 and S.1098, 89th Cong., 1st Sess., Serial No. 89-23, page 14.*"[51]

The Commission had, in fact, as we already have pointed out, promised the Congress that it "would exercise extreme caution" in using Section 1(14)(a). And, it did exercise such care in the first proceeding; in the 1967 decision.

It did not do so the second time. Rather, it acted hastily, under "Senatorial pressure," as Judge Simpson said here,[52] or moved by "Senatorial spurs," as Judge Friendly put it in the *Long Island* decision.[53] Even so, there never was an expression by the ICC in the second proceeding, the one now

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[50] *Id.*, p. 14.

[51] Id., pp. 13-14.

[52] *Florida East Coast Railway Company* v. *United States,* 322 F. Supp. 725, 732 (D.C. Fla. 1971) (J.S. App. 16a).

[53] *Long Island Railroad Company* v. *United States,* 318 F. Supp. 490, 498 (D.C. N.Y. 1970) (J.S. App. 134a).

under review, that indicated anything other than a firm belief that Sections 556 and 557 governed.

At the beginning of that proceeding, the Commission made it quite clear that it intended to have a full hearing, including a prehearing conference, an oral hearing in Washington, and, perhaps, regional hearings. The Commission carefully told the parties that Sections 556 and 557 of the Administrative Procedure Act would govern. It said, further, in its convening notice:

> "*It is ordered,* That under authority of Part I of the Interstate Commerce Act (49 U.S.C. 1, *et seq*) more particularly Section 1(14)(a) and the Administrative Procedure Act (5 U.S.C. 553, 556 and 557) a proceeding be, and it is hereby, instituted for the purpose of implementing those provisions of the law relating to our authority to encourage the acquisition and maintenance of an adequate car supply as specified in Public Law 89-430."[54]

The hearings were never held. Instead, the Commission abruptly handed down an order which purported to be an "interim report,"[55] but which, as a practical matter, was the same order in all material respects as the final order, the one under attack here.

Commissioner Bush said, in the "interim report," that while the majority had handled the proceeding "in an expeditious manner," incentive charges couldn't be prescribed "until a hearing has been held as contemplated by statute."[56] Again, though, no such hearing was held.

Even so, the Commission continued to act with the under-

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[54] Notice of Proposed Rulemaking. (App. 52).

[55] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183 (1969) (J.S. App. 51a-84a).

[56] Id., p. 194 (J.S. App. 62a).

standing that it must give protection beyond Section 553 of the Administrative Procedure Act, noting in its decision that it had "accord[ed] the parties a hearing under section 556 of that act." [87]

Nor has the Department of Justice acted differently. To begin with, it is observed that reference was made at pages 17-18 of the government's brief to the Attorney General's Manual on the Administrative Procedure Act (1947), but the inferences drawn by the government's brief are unfair. Actually, the Manual supports the Appellees' argument, as this language from pages 33-34 of the Manual will illustrate:

> "The Interstate Commerce Commission and the Secretary of Agriculture may, after hearing, prescribe rates for carriers and stockyard agencies, respectively. Both types of rate orders are reviewable under the Urgent Deficiencies Act of 1913 (28 U.S.C. 47). Nothing in the Interstate Commerce Act, the Packers and Stockyards Act, or the Urgent Deficiencies Act requires in terms that such rate orders be "made on the record", or provides for the filing of a transcript of the administrative record with the reviewing court, or defines the scope of judicial review. However, both of these agencies and the courts have long assumed that such rate orders must be based upon the record made in the hearing; furthermore, it has long been the practice under the Urgent Deficiencies Act to review such orders on the basis of the administrative record which is submitted to the reviewing court. *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934); *Acker* v. *United States*, 298 U.S. 426 (1936). *It appears, therefore, that rules (as defined in section 2(c) which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies Act on the basis of the evidence adduced at*

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[87] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 219 (1970) (J.S. App. 87a); and Appellants' brief, p. 10.

the agency hearing, must be regarded as 'required by statute to be made on the record after opportunity for an agency hearing.' " (Emphasis added)

A reading of the government's Jurisdictional Statement makes perfectly clear, throughout, that the Department considered Sections 556 and 557 to govern the very questions being presented to this Court, but the government's position has been that the Appellees received their protection "under 556 of the Administrative Procedure Act." Beginning at page 23 of its brief to the court below, the government dedicated an entire section of its pleading to the argument that "THE COMMISSION GRANTED ALL PARTIES A FULL AND FAIR HEARING," giving full support there to the "detailed and scholarly" decision in *Long Island* which had concluded "that the third sentence of § 553(c) was applicable" and that Section 556 governs.[58]

In summary, then, it comes as something of a surprise for the government now to argue, at page 15 of its brief, that it was all right for the ICC to reject the concept of a full and fair hearing, and to ignore "the resolution of any substantial factual dispute." That change of heart as to procedure fairness cannot be justified, as the government attempts, on the grounds of "the extreme displeasure voiced by Congress" over the Commission's lack of speed.[59]

D. The Commission Failed to Give the Protection Afforded by Sections 556 and 557.

The court below held that, because the Commission did not heed the requirements of Section 556(d) of the Ad-

[58] *Long Island Railroad Company* v. *United States,* 318 F. Supp. 490, 497 (D.C. N.Y. 1970) (J.S. App. 131a).

[59] Appellants' brief, p. 22.

ministrative Procedure Act, the Seaboard Coast Line and the FEC were improperly refused a hearing and the right to cross examination. As a result, said the court, both parties "were prejudiced by the summary procedures of the Commission."[60] The law and the record in this proceeding support that finding.

1. **Prejudice Was Alleged and Shown by Appellee.** Section 556(d) of the Administrative Procedure Act affords each party to a hearing the right:

> "* * * to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Further, it goes on to say:

> "In rule making * * * an agency may, *when a party will not be prejudiced thereby,* adopt procedures for the submission of all or part of the evidence in written form." (Emphasis added)

Throughout the Commission proceeding, under review, the Seaboard Coast Line urged, and showed, that it would be prejudiced by the adoption of summary procedures.

The Commission suggested in its Jurisdictional Statement that the meaning of the word "prejudice" is not known.[61] But, whatever it means, the government goes on to say that the Seaboard Coast Line did not prove it would be harmed.[62] On the other hand, the Appellee has urged from the be-

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[60] *Florida East Coast Railway Company* v. *United States,* 322 F. Supp. 725, 728 (D.C. Fla. 1971) (J.S. App. 7a).

[61] Jurisdictional Statement, p. 17.

[62] Id., pp. 15-17. Also, appellants' brief, p. 24. For the purpose of argument only, Appellee accepts, but does not admit, that it had the burden of proving prejudice. Appellee will not comment upon the ICC's own responsibility to consider and avoid prejudicial action.

ginning that it was prejudiced by the Commission's failure to hold a full hearing. And, the court below, concluding that the factual situation in this case was quite different from that in *Long Island,* agreed that the Seaboard Coast Line and the FEC were prejudiced by the summary procedures of the Commission.[63]

There is hardly any need to have the Court define the word "prejudice." Its meaning is clear. Corpus Juris Secundum says, for example:

> "As a verb, the word 'prejudice' is defined as meaning to injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage; injure; impair; to cause any harm or damage or loss to; to bias the mind by hasty and incorrect notions, and give it an unreasonable bent to one side or other of a cause; to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question." [Reference numbers omitted.][64]

All of the points noted in that definition apply here.

A party is prejudiced, or aggrieved, when a right is invaded by the act complained of and, as a result, the party suffers a loss.[65] Prejudice under the Administrative Procedure Act means the experiencing of undue difficulty in protecting an interest.[66] The test should be whether the complaining party had a fair opportunity to defend its position.[67]

There was no fairness here. As the *Long Island* court

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[63] *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 728 (D.C. Fla. 1971) (J.S. App. 7a).

[64] 72 C.J.S. 481.

[65] *Glos* v. *People,* 102 N.E. 763, 766 (1913).

[66] Compare *Deakyne* v. *Commissioners of Lewes,* 416 F.2d. 290, 300 (CA3 Del. 1969).

[67] Ibid.

pointed out,[68] the facts from which the Commission reached its conclusion were based upon data obtained during "an investigatory-research program" from "sampling procedures developed and administered by our [the ICC's] staff." On the basis of data developed internally, the Commission issued an "interim report," following which, after a decent period of time during which parties were given their only opportunity to comment, it solemnly confirmed its "interim report." If nothing else, the Commission's fixed anticipatory judgment shown by the so-called "interim report," as contradistinguished from interim opinions which might yield to real evidence, shows solid prejudice.[69] In view of the determined way in which the ICC proceeded, perhaps it is true that it was "extremely unlikely that the holding of an oral hearing would have affected the Commission's ultimate order,"[70] as the ICC has admitted to this Court. There was then, and is now little doubt that the "interim report" was to be, in reality, the Commission's ultimate decision. But, even if the ICC had sufficient information upon which to base that "interim report," which it did not have, the Seaboard Coast Line at least was entitled to try to change the Commission's mind, and it was entitled, as it asked,[71] to try to test some of the unexplained conclusions in the "interim report." Without that opportunity it was harmed, or, as the statute says, "prejudiced."

In many ways this prejudice goes back several years, and it is pertinent, Appellee believes, to consider the Commis-

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[68] *Long Island Railroad Company* v. *United States,* 318 F.Supp. 490, 493. (D.C. N.Y. 1970) (J.S. App. 124a).

[69] Compare *Schipper & Block, Inc.* v. *Carson Pirie Scott & Co.,* 256 N.E. 2d 854, 857 (1970).

[70] Jurisdictional Statement, p. 15.

[71] *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 733, 736 (D.C. Fla. 1971) (J.S. App. 19a, 29a).

sion's past attitude with respect to car ownership by the railroads.

As the record in this case now shows, several years ago, on April 26, 1962, one of the Commissioners, noting that a shipper should not be made to "fit his products into a few basic types of cars, such as box, gondola, and flat cars," quite properly recognized the need for "cars to meet shippers' specialized needs," and he remarked that "[r]ailroads are realizing the possibilities inherent in specialized equipment for affording more attractive service to shippers." Then, in the very year in which it handed down its "interim decision" the Commission expressed the same feeling when, in the proceeding involved in *Allegheny-Ludlum Steel,* in speaking of the equipment demands of shippers, it said:

> "The originating carrier is in the best position to know the requirements of its shippers and is in a far better position than another carrier 1,000 or 2,000 miles away to make judgment as to needs of local shippers. Although similar freight cars may be, and are used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus, railroads which load large quantities of grain will tend to own a large number of boxcars with door openings suitable for grain service. Roads which originate large quantities of lumber will tend to own large fleets of 50-foot boxcars with door opening of 14 or 15 feet. Other variations include car width, height, type of lining and capacity, both cubical and weight carrying."

It went on to say:

> "One of the basic tenets of car supply, that is, a carrier should protect traffic originating on its own lines, is apparently being ignored. Such a situation we find to

be unconscionable and one that must not be continued." [72]

As pointed out earlier in this brief, when the then-Chairman of the Commission testified before the Senate's Committee on Commerce on April 7, 1965, with respect to the enactment of Public Law 89-430, he pointed out that "each railroad should own freight cars of various types which, together with foreign cars used in strict accordance with car service rules, are sufficient in numbers to protect the loadings it originates."

Until the service of the "interim report," the Seaboard Coast Line had every reason to believe that it could rely upon past Commission-stated objectives and upon its own business requirements with respect to car types. Nor had the Seaboard Coast Line been warned otherwise in the first Commission decision under the 1966 amendment to Section 1(14)(a). In fact, the Commission emphasized in the 1967 decision that in many respects "the standard boxcar has been replaced." [73]

After the 1967 decision, the Commission commenced its study leading to the decision which is under attack here. That study consisted of sampling data, only, which the railroads were required to submit to the Commission for an 11-month period in 1968. The Commission clearly stated the data was not designed to develop the causes of any inadequacy in car supply.[74]

Based upon that data, as well as material from the Internal Revenue Service obtained from outside the record, and, possibly, other information not known yet to Appellee,

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[72] *Investigation of Adequacy of Freight Car Ownership,* 335 I.C.C. 264, 286, 287 and 290 (1969).

[73] *Incentive Per Diem Charges,* 332 I.C.C. 11, 15 (1967).

[74] Appendix C to Joint Answer of the Commission. (App. 46).

the Commission established the incentive payments which are the subject of this proceeding. This was all done without oral hearings and without any real knowledge on the part of the railroads as to what the Commission was doing. Appellee was prejudiced by the fact that it wanted, but was never afforded, the requested opportunity to cross-examine the only persons, Commission personnel, who could be tested as to the sampling data which apparently formed the basis of the ICC conclusions.

The Commission argues that those on its staff who prepare factual material used in a proceeding cannot be questioned.[75] It is wrong. We do not quarrel with the government's assertion that we may not probe the Commission's mental processes; we did not, and do not, seek to do so. But, Section 556 does permit us "such cross-examination as may be required for a full and true disclosure of the facts." And, in proceedings in which evidence is given by employees of the ICC, those witnesses may be, and are, cross-examined.[76]

The Seaboard Coast Line was prejudiced, further, by the lack of proper notice. It developed that, under the Commission's order, the railroads are required to make payments which range upward to $12.98 a day, but the incentive payments are to be made for plain boxcars only. At no time during the course of the Commission's study was the Seaboard Coast Line even aware of the Commission's inclination to restrict the incentive payments to plain boxcars. The Notice of Proposed Rulemaking which began the dis-

[75] Appellants' brief, pp. 25-26.

[76] One such instance was the Section 1 (14) (a) per diem proceeding in *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.*, 332 I.C.C. 176 (1968); another, the Commission case with which this court treated in *United States* v. *Allegheny-Ludlum Steel,* U.S. , 32 L Ed 2d 453 (1972); and yet another was the 1967 incentive proceeding in *Incentive Per Diem Charges,* 332 I.C.C. 11.

puted proceeding"[77] related to all types of freight cars. It was not until the so-called "interim report," which as a practical matter, was the final order too, that the parties, for the first time, learned this fact:

> "We limit our discussion to plain boxcars. The problems in other areas may well be as severe, but their magnitude is not. The size of the national boxcar fleet vis-a-vis other types of freight cars persuades us that boxcars require our separate attention. Our study of other types of cars continues."[78]

So, after telling this Appellee in various ways for some time that it should tailor its car fleet to suit the needs of the shippers on its line, the Commission's order, entered without any effective opportunity to rebut it, penalizes the Seaboard Coast Line for following the Commission's admonition. That is, most of the new cars which the Seaboard Coast Line have acquired have been equipped to meet the needs of its shippers; those cars are boxcars, but they are more expensive to own and more costly to maintain than plain boxcars. Now the Seaboard Coast Line is deprived of necessary dollars because it does not have sufficient unequipped cars of the type—not which it needs—but which other railroads need to meet the requirements of their shippers. This comes about because the Commission's incentive per diem order applies only to unequipped, plain boxcars. When a plain boxcar from another railroad is on the lines of the Appellee, the latter will pay an incentive charge; when the Appellee's equipped boxcars are on the lines of the other carrier, often performing the same service there as plain box cars, the Seaboard Coast Line receives no incentive in return.

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[77] App. 52-53.

[78] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 198 (1969) (J.S. App. 66a).

Had the Commission followed the requirement of Section 553(b)(3) of the Administrative Procedure Act, and included in its Notice the terms or substance of the proposed rule, Appellee would have been in some position to have addressed itself to the impropriety of favoring owners of plain boxcars over owners of equipped boxcars. It was, therefore, prejudiced by the Commission's failure to permit a test of whatever Commission thinking led to the penalties against those lines which paid heed to the earlier ICC pronouncements that local shipper needs should be met.

As a result of the application of this order to a specific type of boxcar only, the Appellee will pay more in incentive charges than it will receive. In fact, it will pay a great deal more. Its damage—its net loss—for the six-month period of each year during which incentive per diem will be in effect will be some $1,850,000. The incentive per diem experiment now is in its third year.

After the Commission's "interim report" was handed down, the Seaboard Coast Line asked for time in which to assess the effect of the decision, and it sought a hearing to show the harm which the order would cause to its equipment program. Both requests were rejected summarily by the final Commission order, the one now under attack.

It is untrue, as the Commission now has told this Court, that "Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased."[79] The Seaboard Coast Line's statement, to the contrary, clearly told the Commission what was unexplained in its "interim report" and stated some of the things which needed to be tested at an oral hearing.

Regardless of what the government now says, had the Seaboard Coast Line had an opportunity to cross-examine,

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[79] Jurisdictional Statement, p. 8; and Appellants' brief, p. 8.

and explore, the reasoning behind the Commission's report and order, it feels that it would have been able to convince the Commission that the record did not support its conclusions. It did not have that opportunity and, thus, it was prejudiced.

The principal mistake made by the Commission in its order, that is, the conclusion that boxcars would be returned quicker to the owning lines if some incentive over the basic per diem could be applied, would have been avoided had there been a hearing. This Appellee can make that statement in a positive manner because there is nothing in the Commission's record to support the Commission's conclusion. Indeed, so far as Appellee is aware, most, if not all, of the evidence of record is to the contrary. Any hearing would have developed the fact that incentive charges could not induce the Seaboard Coast Line to return cars faster than it does at present. But, how can you test opinions of ICC personnel without examining them?

When the Seaboard Coast Line asked the Commission for a hearing in its statement of March 17, 1970,[80] it pointed out that the Commission's "interim report" had expressed a desire to "produce a steady annual, although not perennial, flow of funds to the creditor per diem roads with which they can purchase additional plain boxcars." Appellee has been diligent in acquiring equipment to meet the needs of its shippers, and is a creditor road, yet the Commission's order will penalize the Seaboard Coast Line and will not send to it any "flow of funds." Instead, when it had its only opportunity to comment upon the "interim report," the Seaboard Coast Line pointed out that its necessarily-hasty study showed that it will lose "in excess of $1.5 million each year

[80] *Florida East Coast Railway Company* v. *United States*, 322 F.Supp. 725, 735 (D.C. Fla. 1971) (J.S. App. 24a).

as a result of the Commission's 'experiment,' to the detriment of its car supply program." As soon as the Seaboard Coast Line's studies were completed, it learned that its annual loss would be in the amount of $1,850,000. The Commission's mistaken belief that such a creditor line as the Seaboard Coast Line would benefit from any "flow of funds" could have been avoided if the usual safeguards had been taken. We cannot believe it "unlikely" that the Commission's conclusions would have been different if someone at the ICC had been tested on cross-examination about that vital point.

Further, it is clear from a reading of the Commission's decision that shipper and carrier interests in the Southeast (that part of the country referred to by the Commission in its report as Zone 3) received no real consideration in this proceeding. The Commission pointedly confined itself to the plain boxcar needs of the Midwest, acknowledging that "problems in other areas may well be as severe," but concluding that it would continue its study in the other areas until some other time.[81] The Seaboard Coast Line very carefully called the Commission's attention to that flaw, and was prejudiced by the fact that the Commission overlooked it in its final treatment of the problem. Since the Commission would have had to face careful examination on that point at an oral hearing, the lack of such a hearing, on a point about which only the ICC's representatives could answer questions, was damaging to the Seaboard Coast Line. That failure would have been remedied by a full hearing. And, it is not enough for the Commission to suggest that it will conduct some future study insofar as other railroads are concerned because, while that study is going on, the Seaboard

[81] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 198 (1969) (J.S. App. 66a). By "other areas" the Commission appears to mean "other types of cars." There has been no such study.

Coast Line's car supply program will suffer and its financial position will be eroded.

As Appellee told the Commission in its Statement of Position, the lack of time and proper hearing placed it "before the Commission without a real chance to present detailed verified statements."[22]

If, then, it is necessary that Appellee show that it was prejudiced by the procedure followed by the Commission, the Seaboard Coast Line showed harm at each juncture of the Commission proceeding.

2. **An Oral Hearing Was Required Here.** If the Appellees have shown this Court that they were prejudiced by the Commission's summary handling of the incentive per diem proceeding then, as pointed out in the preceding section of this brief, the language of Section 556(d) of the Administrative Procedure Act comes into play. It provides that, in rulemaking, the Commission may "adopt procedures for the submission of all or part of the evidence in written form" *only if* "a party will not be prejudiced thereby." But, if a party is disadvantaged by the exclusive use of written testimony, then Section 556(d) permits either the submission of oral evidence or "cross-examination as may be required for a full and true disclosure of the facts" or both.

The Commission went outside of the record here for some of the evidence used in reaching its conclusions, but, otherwise, it took all of the evidence in "written form." The oral hearings which were requested were denied the parties, and that constituted error on the Commission's part.

Before commenting on that point, however, this Appellee believes that it did not even need to show prejudice, because Section 556(d) also provides that the parties "are entitled" to certain rights, whether they are prejudiced or not, and

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[22] *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 733 (D.C. Fla. 1971) (J.S. App. 20a).

one of those rights is to "such cross-examination as may be required for a full and true disclosure of the facts."[83] Had the Commission worked in the open in this proceeding, as it normally does, and had it made the proposed incentive per diem rules available to the railroads for proper study and subsequent cross-examination of those persons responsible for whatever "evidence" was developed by the Commission's staff, it is likely that the Seaboard Coast Line would not be before this Court.

In any event, as the lower court found,[84] it having been made clear that the Appellees would be harmed by the Commission's summary procedures, and since each Appellee had "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony" (thus bringing this case "within the exception expressed in *Long Island*"), they were entitled to the protection of Section 556(d) of the Administrative Procedure Act. Both the court below and the *Long Island* court ought to be upheld in this regard.

This oral-hearing concept is not new to the Commission, for in the 1967 decision, after noting that it must "exercise extreme caution," the ICC itself said it should be followed.[85] Indeed, when acting under Section 1(14)(a) of the Act in

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[83] *Long Island Railroad Company* v. *United States,* 318 F.Supp. 490, 498 (D.C. N.Y. (1970) (J.S. App. 134a-135a), does not agree with this Appellee on that point, but that court failed to consider all of Section 556. The only reason why the court disagreed with The Long Island Rail Road that, at least, the Commission should have held oral hearings to test the Commission's evidence, was the Long Island Rail Road's failure to have "pointed to specifics on which it needed to cross-examine or present live rebuttal testimony." But, that is not what Section 556 (d) says; it gives the parties the positive right to cross-examine and to rebut. For example, 2 K. Davis, Administrative Law Treatise § 14.15.

[84] *Florida East Coast Railway Company* v. *United States,* 322 F.Supp. 725, 728-729 (D.C. Fla. 1971) (J.S. App. 7a-8a).

[85] *Incentive Per Diem Charges,* 332 I.C.C. 11, 14 (1967).

the past, even before the passage of Public Law 89-430 in 1966, the Commission consistently afforded oral hearings. In addition to the only other incentive per diem proceeding under the 1966 law, there were many such cases under Section 1(14)(a) prior to 1966.[86]

In two of its decisions[87] the Commission appears to support our definition of the words "agency hearing" as used in Sections 553, 556 and 557 of the Administrative Procedure Act. At page 606 of *National Trucking* it said:

> "The word 'hearing' is not specifically defined in the procedure act, but it is clear from the manner in which that term is used therein that the reference is to oral hearings only and not to proceedings conducted under the Commission's shortened or modified procedure."

In *Reliance,* it went on to verify the right to test evidence by cross-examination, and then cited two decisions of this Court, *Louisville* and *Morgan.*[88] The Commission took the position in *Louisville,* as noted at page 93 of this Court's decision, that it could act on data collected by it "even though not formally proved at the hearing." This Court wouldn't agree, saying:

> "But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the

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[86] A few out of many are *Investigation of Adequacy of Freight Car Ownership,* 335 I.C.C. 264 (1969); *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.,* 332 I.C.C. 176 (1968); *Increased Per Diem Charge on Freight Cars,* 268 I.C.C. 659 (1947); *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.,* 248 I.C.C. 109 (1941); *Rules for Car-Hire Settlement,* 165 I.C.C. 495 (1930); *Marcellus & Otisco Co.* v. *N.Y.C.R.R.Co.,* 104 I.C.C. 389 (1925); and *Assigned Cars for Bituminous Coal Mines,* 80 I.C.C. 520 (1923).

[87] *Reliance Steel Products* v. *Baltimore & O.R.Co.,* 291 I.C.C. 695 (1954); *National Trucking & Storage Co., Inc.* v. *Pennsylvania R. Co.,* 294 I.C.C. 605, 606 (1955).

[88] *Interstate Commerce Com.* v. *Louisville & N.R.Co.,* 227 U.S. 88 (1913) and *Morgan* v. *United States,* 304 U.S. 1 (1938).

party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.

* * *

"The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties.

* * *

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous unknown, but presumptively sufficient information to support the finding."

Later, in often-cited *Morgan,* this Court dealt with a statute which, in this Appellee's opinion, is less positive as to the need for a hearing on the record than Public Law 89-430. In doing so, at pages 14 and 15 the Court confirmed the need for "a fair and open hearing" by pointing out:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that

> in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

In *Ohio Bell*[89] this Court pointed out, too, that not only is there a right to a fair hearing, but that "[t]here can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay." Then, citing *Morgan,* this Court said in *Willner:*[90]

> "Those who are brought into contest with * * * Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Just why the Commission should have conducted a full hearing in this case, as required, and the mistakes which can result when a major decision such as *Incentive Per Diem—1968* is treated in summary fashion, will be discussed later.

3. **The Commission Failed to Observe the Requirements of Section 1(14)(a).** The court below noted that this Appellee had charged that the Commission had failed to comply with the requirements of Section 1(14)(a), but said:

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[89] *Ohio Bell Teleph. Co.* v. *Public Utilities Com.,* 301 U.S. 292, 304-305 (1937).

[90] *Willner* v. *Committee on Character & Fitness,* 373 U.S. 96, 105 (1963).

> "Since we find that the Commission acted illegally in denying the plaintiff railroads a hearing before the imposition of the incentive per diem charges, we pretermit discussion of all but the first point."[91]

We renew our charge.

The Commission is perfectly aware of its responsibilities in utilizing the authority found in Section 1(14)(a). In its 1967 decision it said:

> "Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. We have observed that the adequacy of the national freight car fleet depends upon the interplay of a number of factors, none of which can be said to be of superior importance. Further, since the effect of an incentive charge must be produced over a future period, consideration must be given to possible changes in these factors. In recent years many innovations and improvements have taken place in car design and operation.
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> * * *
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> "Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide

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[91] *Florida East Coast Railway Company* v. *United States*, 322 F. Supp. 725, 727-728 (D.C. Fla. 1971) (J.S. App. 5a).

review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. It is quite obvious that application of an incentive charge which served to encourage the acquisition of cars not adaptable to efficient provision of needed service over their normal lifetime would not be in the national interest. Shipper need, demand and acceptance with respect to future equipment is a significant factor." [92]

Those responsibilities, and those factors, recognized in the 1967 decision—and recalled as late as pages 5 and 6 to the government's brief to this Court—were sidetracked here.

a. *The Order Is Arbitrary, Not Reasonable.*

The very first admonition of Section 1(14)(a) is that any prescribed rule, regulation or practice must be "reasonable." And, Section 706 of the Administrative Procedure Act requires a reviewing court to hold unlawful any agency action found to be arbitrary.

The rules prescribed in the ICC decision now under attack are considerably less than reasonable, a fact which could have been made plain to the Commission had a hearing been conducted. The Seaboard Coast Line sought to be heard for, among other reasons, the purpose of explaining to the Commission why its rules would be harmful to the railroad and why, in turn, they would result in a worsening of the car supply situation with respect to Seaboard Coast Line shippers. In that regard, if it was reasonable for the Commission to give "first priority to the boxcar," [93] it certainly was unreasonable to consider only "plain" boxcars and to refuse consideration of other types of boxcars, many varieties of

[92] *Incentive Per Diem Charges*, 332 I.C.C. 11, 14-15 (1967).
[93] Ibid.

which serve the same purpose. The Commission, itself, had made that clear in its 1967 report.

Nor did the Commission give consideration to the "services currently desired by the shipping public" in the Southeast, or to "the interplay of a number of factors" of which it spoke in its 1967 decision. Instead, it handed down an arbitrary requirement which failed to consider other than a limited number of factors.

Then, Section 1(14)(a) requires that any rule with respect to "the compensation to be paid" also must be reasonable. Although the Seaboard Coast Line questioned the scale of incentive charges prescribed by the Commission, the ICC has yet to show that the various levels of incentive charges are based upon good reason. We are, of course, pleased that the Commission recognizes that the level of the charges is questionable and that the proceeding will remain open for new information as experience is gathered,[94] but the Commission's conclusion clearly is not reasonable. It is not enough to say that the charges are placed at the present arbitrary level in order to give owners of unequipped boxcars "returns on investment * * * comparable to the higher average returns earned by non-regulated corporations."[95] Aside from the fact that the Commission stated that it reached this conclusion on untested data from beyond the record, there can be no good reason why investments in unequipped boxcars should receive higher rates of return than those on the more-costly equipped boxcars or on other types of rail equipment.

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[94] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 225 (1970) (J.S. App. 93a).

[95] Id., p. 224 (J.S. App. 92a).

b. *The National Car Supply Was Not Considered.*

Section 1(14)(a) requires the Commission to "give consideration to the national level of ownership of such types of freight car *and* to other factors affecting the adequacies of the national freight car supply." (Emphasis added) The Commission gave consideration to the "level of ownership" of a type of freight car, plain boxcars, but it did not do so on a "national level." In reporting the results of the freight car study which it had conducted, the Commission showed that it had studied only zone 2 and zone 4 carriers.[96] Appellee is primarily a zone 3 carrier, and little, if any, consideration was given to its territory. The national level was not even considered so far as we can determine from the Commission's decision.

c. *Other Section* 1(14)(*a*) *Factors Were Not Considered.*

There was another very important omission by the Commission. The statute requires not only that the ICC consider the national level of ownership of—in this case—plain boxcars, but it also must consider "other factors affecting the adequacy of the national freight car supply." So far as we can discern, no consideration was given to "other factors." Of particular concern to the Seaboard Coast Line, the ICC ignored the impact of the new Commission requirements on the supply of equipped boxcars or on other types of equipment.[97] And, there was no thought given to "the extent to which the transportation service [one type of car

[96] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 198-202 (1969) (J.S. App. 66a-70a).

[97] At page 7 of its brief, the government says that the S.C.L. "firmly opposed" a "Commission proposal for further study of additional types of fright cars". That assertion is false.

performs] is or can also be provided by cars of other types," to use the Commission's words from its 1967 decision. Further, the Commission considered rules only for plain boxcars, even though it also found, inconsistently, that problems with other cars "may well be as severe." It admits that its study is incomplete, saying that it must in the future look to see whether other types of freight cars are interchangeable with plain boxcars.[98] The record in the 1967 proceeding shows that they are.[99]

d. *The Commission Ignored Its Own Views of the Requirements of the Statute.*

The Commission failed to heed the statutory requirement that it consider the "national level of ownership." It ignored the effects of its rules on the freight car supply in other segments of the country. Indeed, it ignored its own 1967 admonition:

> "Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. They cannot be founded in conjecture and this Commission will not risk the stability and effectiveness of the railroad industry by exercising its authority capriciously."[100]

Because the Commission did act capriciously, and because the order under attack does not comport with the requirements of Section 1(14)(a), it should be set aside by this Court for reasons not even reached by the court below.

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[98] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 228 (1970) (J.S. App. 96a).

[99] *Incentive Per Diem Charges*, 332 I.C.C. 11, 15 (1967).

[100] Id., pp. 16-17.

4. **The Commission's Decision Lacks Necessary Findings and Conclusions, and the Reasons or Basis Therefor.** Section 556 of the Administrative Procedure Act requires "reliable probative, and substantial evidence" as support for Commission-prescribed rules. Section 557 places upon the Commission the burden of showing in its decisions "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." Section 706 of that Act also tells the reviewing courts that they shall set aside any agency decision which is arbitrary and upsupported by substantial evidence.

Some years ago, this Court said, in *Louisville,*[101] that:

> "A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.'"

That has been a consistent requirement throughout the years. It was restated in *Burlington,* where this Court went on to state that:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"[102]

It has been said, correctly, that:

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[101] *Interstate Commerce Com.* v. *Louisville & N. R. Co.,* 227 U.S. 88, 92 (1913).

[102] *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167 (1962). Also, annotation references 2 and 3 in the *Burlington* decision as reported in 9 L Ed 2d 207. Particularly strong is *Aberdeen and Rockfish Railroad Co.* v. *United States,* 270 F.Supp. 695 (D.C. La. 1967), *aff'd. Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.,* 393 U.S. 87 (1968), and *Palmer* v. *United States,* 75 F.Supp. 63, 75-76 (D.C. D.C. 1947).

> "It is not enough that some suggestion of a reason should 'lurk' in the Commission's report; a reviewing court cannot uphold an order on a ground which the Commission has not made sufficiently plain that the court can be sure the Commission meant to act upon it and had a factual basis for doing so." [103]

Nor will it do for the ICC to confess, as it did on page 7 of its brief to this Court, that it was moved to a decision by an "impatient" Congress which "emphatically expressed the opinion that the Commission had sufficient information upon which to act."

The fact of the matter is that there are neither reasons, findings, nor evidence to support the Commission's conclusions here. Therefore, the Commission's decision should be rejected. But, the court below found it unnecessary to consider this flaw in the ICC's work because of the court's finding that a hearing should have been held.

a. *The Evidence Cannot Support a Conclusion That Incentive Charges Will Improve Operating Practices.*

The most glaring error in the Commission's entire decision relates to the principal objective of incentive per diem charges, it being the purpose of those charges to spur the railroads into returning boxcars to the owning lines as quickly as possible, and to the Commission's failure to make clear why it now has reversed its 1967 conclusion that incentive per diem won't help.

In its 1967 report, the Commission made clear that it was "not satisfied, on this record, that addition of an interim incentive charge" would have such an impact as to improve

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[103] *New York Central Railroad Co.* v. *United States*, 207 F.Supp. 483, 496 (D.C.N.Y. 1962).

present operating practices.[104] Later, it acknowledged that conclusion in the proceeding now being considered.[105] Nevertheless, without any facts of record to bolster its new conclusion, and without stating in the decision its support for the conclusion, the Commission turned itself about and surmised that incentive per diem "should tend to speed up the use and movement of cars."[106] If, as we charge, this conclusion of the Commission cannot be supported by evidence of record, and if, in fact, as we say, the only evidence is to the contrary, then the entire order must fail because its underpinnings are gone and it will serve no reasonable purpose.[107]

b. *Contrary to the ICC's Conclusion, There Is a Clear Showing that the Charges Will Unduly Burden the Seaboard Coast Line.*

Even if it appeared that the incentive charges would not serve their purpose, the Commission felt that its proposal was worth trying because, after all, "the proposed charges would [not] impose an undue burden on [any railroad opponent] or on any group of carriers."[108] This conclusion is not, and cannot be, supported.

Although the Seaboard Coast Line was not given an opportunity to show the full scope of the loss which it would experience, it did give evidence that it would lose "in excess of $1.5 million" for each six-month period that the disputed scale of charges is in effect. Other railroads, including the

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[104] *Incentive Per Diem Charges,* 332 I.C.C. 11, 16 (1967).

[105] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 185 (1969) (J.S. App. 53a).

[106] Id., p. 186 (J.S. App. 54a).

[107] *Nebbia* v. *New York,* 291 U.S. 502, 525 (1934).

[108] *Incentive Per Diem Charges—1968,* 337 I.C.C. 217, 224, n. 8 (1970) (J.S. App. 92a).

FEC, showed that the proposed charges would be harmful. Regardless of the showing made by others, the loss which will be experienced by this Appellee constitutes an "undue burden," and any conclusion to the contrary is faulty and without support.

In its only direct response to any Seaboard Coast Line objection, the Commission said that the Seaboard Coast Line is not going to be penalized for owning better boxcars because it will receive a greater basic per diem rate "when its equipped, expensive, and more modern boxcars are on other lines." "It," said the Commission of the Appellee, "overlooks the scale of basic per diem charges, which provide larger per diem payments for the more modern and more expensive cars." [109] This is a most inexpert response for an expert agency to make, for the Commission knows that basic per diem is based upon ownership costs; incentive per diem is not. Whether we're considering 40-year-old plain boxcars or brand-new equipped boxcars, basic per diem returns to the owner of either kind of car only enough to meet its ownership costs. Incentive per diem is something else; it's an additional charge over and above the basic per diem rate. The Seaboard Coast Line won't receive incentive per diem for its more expensive cars, but the owners of plain boxcars will. Thus, when the netting out of interline accounts takes place, the Seaboard Coast Line will come up short—because of the Commission's order—some $308,333 each month, or, $1,850,000 at the conclusion of each six-month period.

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[109] Id., pp. 223-224 (J.S. App. 91a-92a).

c. *There Is no Support for the Commission's Conclusion that the Seaboard Coast Line Will Benefit from the Order.*

Aside from the hoped-for improvement of operating practices, the only other stated purpose of the incentive charges is to penalize railroads which will not buy sufficient quantities of plain boxcars and give funds to creditor railroads which do buy them. The Commission said that the incentive charges will "produce a steady annual, although not perennial, flow of funds to the creditor per diem railroads with which they can purchase additional plain boxcars."[110] Our answer to the Commission was, and is, that the Seaboard Coast Line, acting in conformity with prior demands of the Commission and of good business practice, has been deligent in acquiring equipment, including boxcars, to meet the needs of its shippers; and it is a creditor road. At the only opportunity given to it, the Commission was told these things by this Appellee.[111] Clearly, then, the Commission's conclusion is wrong, for the Seaboard Coast Line, a creditor road, will be penalized and will not be the beneficiary of any "steady annual * * * flow of funds."

Equally erroneous is the Commission's conclusion that "the incentive charges should bring distinct economic benefits."[112] There is something wrong with this statement on its face, because Appellee is going to have some $1.85 million lifted from its pockets each year. So, obviously, the conclusion is incorrect insofar as the Seaboard Coast Line is concerned. Nor can the findings be propped up by the extra-record

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[110] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 186 (1969) (J.S. App. 54a).

[111] *Florida East Coast Railway Company* v. *United States,* 322 F. Supp 725, 733-736 (D.C. Fla. 1971) (J.S. App. 17a-27a).

[112] *Incentive Per Diem Charges—1968.* 337 I.C.C. 183, 190 (1969) (J.S. App. 58a).

support of some data obtained by the Commission from the Internal Revenue Service, as the ICC has tried. Without doubt, some railroads will experience "distinct economic benefits" as a result of the order; others will not.

Further, shippers in Seaboard Coast Line territory will suffer. The railroads of the Midwest, which need the plain boxcars for their shippers, will, under the Commission's incentive plan, receive the "distinct economic benefits" of which the ICC wrote. That is, they will obtain additional plain boxcars, those cars being paid for by the Seaboard Coast Line, among others. Since the latter must buy plain boxcars for other railroads, it must, naturally, reduce its expenditures for new cars needed by its own shippers. This is the kind of "interplay" which was so important to the Commission in its 1967 decision, but which, in its haste, it forgot in 1970.

d. *The Commission's Evidence Is Incomplete.*

The decision under attack states, strangely, that "[t]he critics of the [1968] study point to no specific weakness in it."[118] This conclusion of the Commission is wrong. At every opportunity—at the beginning, in the middle, and at the end of the study—this Appellee did criticize the study as being inadequate. As noted earlier, the Commission failed to take into consideration the southeastern states, the needs of shippers in that territory, and the type of boxcar equipment used by rail customers there. Very important, it did not consider, as it once said it must, that equipped boxcars often are used interchangeably with plain boxcars. And, in sum, it did not heed its own 1967 admonition that its "[c]onclusions in this area must rest upon consideration of

[118] *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 221 (1970) (J.S. App. 89a).

economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program." In fact, the only real objective of the Commission's study here was "to develop data relating to the supply and demand conditions of the railroads in the United States and their performance in satisfying such demand." [114] Numbers, not reasons, were studied. And, numbers cannot support the Commission's conclusions in this proceeding.

e. *Contrary to Its Finding, the Commission Ignored Material Objections.*

Then, the Commission concluded that, for the most part, those parties critical of its order, "do not raise material or substantial allegations of error in that report." [115] The facts are to the contrary. It would be safe to say that virtually all of those critical of the decision raised "material allegations." Certainly, this Appellee did. Its allegation of substantial harm is quite material, yet it was brushed aside for the clear purpose of rushing the Commission's "experiment" into practice.

f. *The Level of the Incentive Charges Has No Support of Record.*

A very important aspect of the Commission's decision is its treatment of the level, or amount, of the incentive per diem charges.

Although it finds "that the 1968 study provides us with adequate data to support the action taken in this report and

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[114] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 197 (1969) (J.S. App. 65a).

[115] *Incentive Per Diem Charges—1968,* 337 I.C.C. 217, 220 (1970) (J.S. App. 88a).

order,"[116] the Commission confesses that the order is only a "tentative approach to the appropriate amount of incentive."[117] The method by which the Commission arrived at this "tentative approach" is described in the "interim report," the Commission being quite candid in stating that the basis for its conclusion is extra-record data collected by the Internal Revenue Service showing the profitability of corporations generally in 1966.[118] Aside from the fact that the Commission has gone beyond the record, the "tentative" charges bear absolutely no relationship to the proper levels necessary to meet the Commission's objective. The Commission's approach does not take into consideration the needs of all of the carriers, and it will lead to unnecessary, irreparable harm to some railroads. The Seaboard Coast Line brought this to the Commission's attention at the only opportunity which was given to the parties, but the Commission's only response was that it would wait until after "actual experience" before it would "determine the precise effect" of the decision.[119] That comment is not such "substantial evidence" as will support the far-reaching, damaging results of the order. Furthermore, the Commission's statement flies directly in the face of its earlier conclusion that "before we undertake to impose the charge * * *, it is of the utmost importance that little, if any, doubt exists as to its necessity and effectiveness."[120] The Commission had more information in its 1967 proceeding about the level of charges than it had in the proceeding here under attack,

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[116] Id., p. 223. (J.S. App. 91a).

[117] *Incentive Per Diem Charges—1968,* 337 I.C.C. 183, 187 (1969) (J.S. App. 55a).

[118] Id., pp. 187-189 (J.S. App. 55a-57a).

[119] *Incentive Per Diem Charges—1968,* 337 I.C.C. 217, 225 (1970) (J.S. App. 93a).

[120] *Incentive Per Diem Charges,* 332 I.C.C. 11, 14 (1967).

but, as the ICC admits at page 6 of its brief to this Court, it did not even then have "reliable information respecting the quantum of interim incentive charge necessary to meet the statutory standards." Here, it had *no* information of record.

5. **Procedural Shortcuts Could Destroy Due Process at the Interstate Commerce Commission.** One of the purposes of the Administrative Procedure Act is to assure procedural due process of law.[121] In such property matters as rates and the exchange of vital revenues, it would not now be wise to give to any regulatory agency the almost limitless power of decision-making based solely upon its expertise. Yet, the Commission, if granted its demand for relief from Sections 556 and 557 of the Administrative Procedure Act in this proceeding, would have that power available.

That charge is exemplified in the continuing problem of divisions of revenue between railroads.

This Court is familiar with the controversy which it looked into in the 1968 *Official-Southern Divisions* proceeding,[122] a proceeding of general application in which the Commission, without supporting evidence of record, had increased for the future the divisions of revenue required to be given by all Southern carriers to all of the railroads operating in the eastern states. Citing Sections 557 and 706 of the Administrative Procedure Act, this Court showed its fear that, without restraints, "[t]he requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise."[123] The

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[121] *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950).

[122] *Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87 (1968).

[123] Id., pp. 91-92.

Court's unanimous decision agreed with the lower court order setting aside the Commission's unsupported finding.

Assuming that spurs now are being applied to the ICC to assist the financial position of certain eastern railroads by increasing their divisions, what is to prevent the Commission from acting just as it did in this incentive per diem proceeding? For, divisions are the subject of Section 15(6) of the Interstate Commerce Act, and, like Section 1(14)(a), the Commission there is admonished, after hearing, to consider certain factors before prescribing just and reasonable amounts. Unlike Section 1(14)(a), Section 15(6) does not even contain the safeguard that action may be taken only "on the basis of such consideration" of specified facts. If the Commission's position is upheld here, there is nothing to prevent circumvention of this Court's 1968 *Official-Southern Divisions* determination, and the Commission's so-called expertise would be given free rein.

Recalling our earlier notation that a search of the Interstate Commerce Act disclosed 72 sections and subsections treating with hearings, none of which requires the making of a decision on the record, this Appellee suggests that, if the Commission should prevail here, many important ICC proceedings, particularly rate and revenue proceedings, would lose the protection of 556 and 557 of the Administrative Procedure Act.

We do not think that the Court has intended that the Commission's powers be so extended. While rulemaking of the type covered by the first sentence of Section 1(14)(a) is "an exercise of legislative rulemaking," as this Court only recently decided in *Allegheny-Ludlum Steel,*[124] the fixing of rates for cars, after hearing and the consideration of specific

[124] *United States v. Allegheny-Ludlum Steel,* U.S. , 32 L Ed 2d 453, 465 (1972).

factors, "has a quality resembling that of a judicial proceeding." [125] The control by a regulatory body of general operating practices, which bears only indirectly on income and outgo, can proceed more freely than the regulation of rates and compensation; the latter having more aspects of a judicial proceeding than the former.[126] So, where a hearing is required, and standards must be considered in fixing reasonable payments, such a case "is frequently described as a proceeding of a quasi judicial character." [127]

While the operations of this country's railroads may be dedicated to a public use, the carriers still remain the private property of their owners, and carrier assets may not be taken from one railroad and given to another without the safeguards of due process.[128] It is essential to due process that, in a proceeding such as this, there be a fair hearing and that the conclusions reached be supported by evidential facts which can be examined on judicial review.[129] If the Interstate Commerce Commission is to be given the broad power which it seeks here, then arbitrary action, in the guise of administrative expertise, will be available to replace the safeguards to property rights now protecting this railroad and other carriers.

E. Restitution Is Not Appropriate Here.

Abandoning its earlier and unsupportable argument that the order of the court below would disrupt the Commission's incentive experiment, the government urges this Court to

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[125] *Morgan* v. *United States*, 298 U.S. 468, 480 (1935).

[126] See 52 Harv. L. Rev. 259, 268-269 (1938).

[127] *Morgan* v. *United States*, 298 U.S. 468, 480 (1935).

[128] *Great Northern R. Co.* v. *Minnesota ex rel R. & W. Com.*, 238 U.S. 340, 345 (1915); *Interstate Com. Com.* v. *Oregon-Wash. R. & Nav. Co.*, 288 U.S. 14, 41 (1933).

[129] *Ohio Bell Teleph. Co.* v. *Public Utilities Com.*, 301 U.S. 292, 300-304 (1937).

require "restitution" of the incentive charges which Appellees would have paid had it not been for the disputed lower court order.[130] This is another of the questions not touched upon by the court below.

It is the government's position that there has been a "wrong" on the part of Appellees, that they have been unjustly enriched at the expense of unnamed parties, and, therefore, that the equitable doctrine of "restitution" should come into play. For support, it cites *Arkadelphia,*[131] a proceeding in which shippers, who had been overcharged, sought to regain monies improperly collected by the carriers.

At page 145 of *Arkadelphia,* this Court confirmed the principle, upon which restitution is based, that "a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." Here, nothing was lost. The order of the court below forbade Appellees to collect incentive per diem monies; none was collected. And, contrary to the government's allegation at page 28 of its brief, this Appellee certainly did not get to "use disproportionately large numbers of general service boxcars belonging to other railroads"; that, in fact, is one of our complaints in this proceeding, since we don't need them.

Mr. Justice Cardozo, speaking for this Court in *Atlantic Coast Line,*[132] would not follow *Arkadelphia* blindly, even in a situation in which the involved carrier obtained monies in reliance upon a basis later found improper. How much more equitable is Appellees' position, when not only did

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[130] Appellants' brief, pp. 28-30.

[131] *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134 (1919).

[132] *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301, 309-310 (1934).

they not receive incentive monies, but the Commission's experiment with incentive per diem was not disturbed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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August, 1972

APPENDIX A

Statutes Involved

Section 1(14)(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 1(14)(a), provides:

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements or compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers

such incentive element or elements if the Commission finds it to be in the national interest.

Section 553(c) of the Administrative Procedure Act, 5 U.S.C. 533(c), provides:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides:

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 706 of the Administrative Procedure Act, 5 U.S.C. 706, provides:

SEC. 706. SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

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CITATIONS

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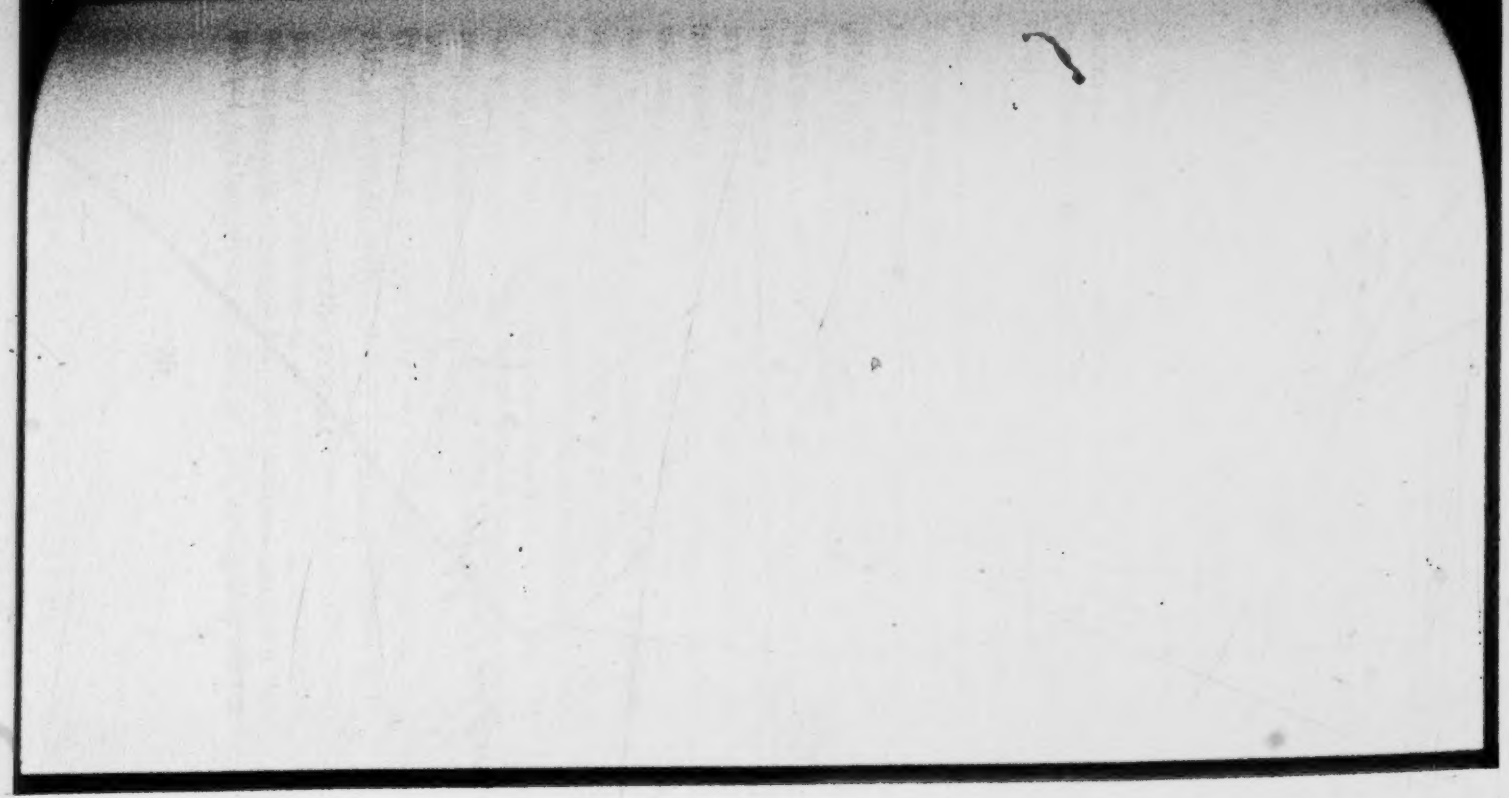

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 70-279

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

FLORIDA EAST COAST RAILWAY COMPANY and
SEABOARD COAST LINE RAILROAD COMPANY

On Appeal from the United States District Court for the Middle District of Florida

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BRIEF FOR THE FLORIDA EAST COAST RAILWAY COMPANY

QUESTIONS PRESENTED

This case involves an order of the Interstate Commerce Commission requiring railroads, including the Florida East Coast Railway Company (FEC), to pay "incentive" compensation in addition to the payment of normal per diem rental for the use of unequipped boxcars during the period September through February of each year. The order was made under section 1(14)(a) of the Interstate Commerce Act, which authorizes the Commission to fix the compensation to be

paid by railroads for the use of freight cars only "after hearing." The case as it comes to this Court presents these questions:

1. Are the Commission proceedings under review governed by the provisions of 5 U.S.C. §§556 and 557.[1]

2. Did the Commission's denial of FEC's request for oral hearing and oral argument prejudice FEC within the meaning of 5 U.S.C. §556(d) or otherwise deprive FEC of the hearing required by 49 U.S.C. §1(14)(a).

STATUTES INVOLVED

Pertinent portions of sections 1(14)(a) and 1(15) of the Interstate Commerce Act, 49 U.S.C. §§1(14)(a) and 1(15), and sections 553 and 556 of the Administrative Procedure Act, 5 U.S.C. §§553 and 556, are set forth in the Appendix.

STATEMENT

I. Commission Proceedings

The Commission order prescribing incentive per diem charges is the product of a second rule-making proceeding.[2] The Commission's order initiating the proceeding recited that the Commission was acting

[1] By letter dated June 17, 1972 from the Clerk of this Court, counsel for the parties were requested to brief this question.

[2] The first incentive compensation proceeding was initiated in June 1966. Written statements and studies were submitted in that proceeding by a number of railroads and by staff members of various bureaus of the Commission. Oral hearings were held before a hearing examiner of the Commission for presentation of additional evidence and for cross-examination of those who prepared and presented written statements and studies, including the members of the Commission's bureaus. The Commission heard oral argument. In its report in that proceeding (332 I.C.C. 11), the Commission considered at length the evidence and findings essential

"under authority of Part I of the Interstate Commerce Act (49 U.S.C. § 1, *et seq.*); more particularly, section 1(14)(a) and the Administrative Procedure Act (5 U.S.C. §§553, 556, and 557)" (App. 52). It made all railroads parties to the proceeding and directed the Commission's Bureau of Enforcement to participate (App. 52). All Class I railroads and certain Class II railroads were ordered to complete and file periodically data sheets showing, for selected stations and dates, the numbers and types of freight cars ordered by shippers and supplied by the carriers. The order also assigned the proceeding for hearing in Washington, D.C., provided for pre-hearing conference before a hearing examiner, and limited requests for leave to intervene by shippers and others to those made orally at the time of hearing (App. 52-53).

No such hearings were held. Instead, on December 22, 1969, the Commission served an interim report (J.S. App. 51a-84a) [3] proposing the imposition of incentive

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to an exercise of its statutory authority under amended section 1(14)(a) to impose incentive compensation charges for any type of freight car. The Commission concluded that the evidence of record in that proceeding lacked reliable factual data which would enable the Commission to comply with the statutory requirements of section 1(14)(a) and make a valid decision as to the imposition of an interim incentive charge. The proceeding was discontinued by order of the Commission dated October 3, 1967. References to this decision are to the printed report of the Commission at 332 I.C.C. 11, *et seq.*

[3] The interim report was preceded by the release on May 13, 1969 to a Subcommittee of the Senate Commerce Committee of a "Report of the Results of Freight Car Study in Ex Parte No. 252 (Sub 1)," together with tables compiled from the data for 1968 furnished by the railroads to the Commission in response to the order of December 26, 1967. *Hearing Before Subcommittee on Surface Transportation of Senate Committee on Commerce*, 91st Cong., 1st Sess., Ser. No. 91-8 (1969).

compensation charges to be applied to unequipped boxcars during the six-month period September through February of each year. The Commission expressed the hope that such an incentive charge might alleviate shortages over a period of years. The Commission emphasized, however, that the proposed incentive compensation was tentative and experimental (J.S. App. 55a), conceding that it was not known whether such charges would produce the desired results (J.S. App. 61a).

The order accompanying the interim report provided that verified statements of facts, briefs, and statements of position with respect to conclusions reached in the interim report might be filed by any interested person. The order further provided that any party requesting oral hearing should set forth with specificity the need therefor and the evidence to be adduced (J.S. App. 81a).

Verified statements, a brief, and a request for oral hearing and oral argument were filed by FEC. The verified statements establish that FEC is required to make substantially greater car hire payments to other carriers than it receives because of its location along the east coast of Florida and the commodities shipped by railroad to and from the Florida peninsula: FEC terminates substantially more carloads of interline freight than it is able to originate, and this imbalance is particularly evident with respect to commodities moving in unequipped boxcars; three of every four unequipped boxcars moved by FEC are returned empty to connecting lines (App. 116-17, 131-32, 135). FEC can not, under existing car service rules and traffic flow, use additional unequipped boxcars or force other railroads to accept empty FEC-owned unequipped boxcars. FEC moves boxcars efficiently and with dispatch

and imposition of additional car hire costs in the form of incentive compensation charges would not improve car utilization or efficiency on the lines of FEC (App. 120-23, 125, 149). The additional car hire cost imposed on FEC by the incentive compensation charge exceeds the net railway income earned by FEC in 1967 and 1968 (App. 115, 119-20).

FEC's request for oral hearing and oral argument stated that FEC desired to subpoena Commission employees who had testified in prior proceedings and specified the evidence expected to be produced.

On April 28, 1970, one month after replies were due to be filed and without further proceedings,[4] the Com-

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[4] Between the date of the interim report and the release of the final report, the Chairman of the Senate Commerce Committee demanded immediate action in this proceeding, particularly with respect to boxcars for the movement of grain and lumber. At a Senate hearing held March 24, 1970 on frieght car shortages, Senator Magnuson of Washington, Chairman of the Senate Commerce Committee, was sharply critical of the Commission and told Commissioner Stafford, Chairman of the Interstate Commerce Commission, that he expected action in this proceeding during April 1970:

> THE CHAIRMAN. . . . I do want to ask the Commission, we did pass a bill three and a half years ago, now, have you implemented that act at all?
>
> MR. STAFFORD. Senator, we spoke of this in our testimony this morning, but the original report is in on it. We expect to have it finally implemented before the heavy season hits us this year. We are now asking for replies.
>
> THE CHAIRMAN. How long does it take to get a report on a bill that passed three and a half years ago? I do not know, maybe that bill is enough if you implemented that . . . .
>
> MR. STAFFORD. The majority of the Commission felt that hearings were required and further consideration.
>
> THE CHAIRMAN. I understand that, but three and a half years is a sufficient time. You know you fellows may not have

mission issued a final report affirming, with only minor changes, the findings and conclusions expressed in the interim report. In this final report, the Commission stated without further explanation that "No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and replies thereto received by this agency accord the parties a hearing under section 556 of that [Administrative Procedure] act" (J.S. App. 87a).

II. Decision of the District Court

FEC brought this action in the court below to set aside and enjoin the Commission's order. The three-judge district court permanently enjoined application and enforcement of the Commission's order as to FEC and Seaboard Coast Line Railroad Company,[5] without prejudice to further proceedings before, and further

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three and a half years left down there. I want to get you out in a blaze of glory.

* * * * *

THE CHAIRMAN. . . . Of course, the act we passed was an incentive per diem rate, and I do not know whether that is going to work or not.

We always seem to run into the answer that we are having a study, and then there is a delay, and pretty soon it is upon us.

MR. STAFFORD. We are through with the study on it now. We are in the process of finalization on that.

THE CHAIRMAN. We have got to have something moving within the next month on this thing to take care of the harvest that is coming up in July—June in some places.

Hearings Before Special Freight Car Shortage Subcommittee of Senate Committee on Commerce, 91st Cong., 2d Sess., Ser. No. 91-68, pp. 54-55 (1970).

[5] FEC and Seaboard Coast Line Railroad filed separate actions in the District Court for the Middle District of Florida to review and enjoin the Commission's order. The actions were consolidated for hearing and were disposed of in a single opinion and order by the district court.

findings and orders by, the Commission not inconsistent with the opinion of the district court (J.S. App. 16a). The court held that, since the Commission was authorized by section 1(14)(a) of the Interstate Commerce Act to act only after hearing, the Commission could not under section 556(d) of the Administrative Procedure Act refuse a hearing and deny cross-examination if a party was prejudiced thereby.

Its decision on this issue was in agreement with that of another three-judge district court in *Long Island R.R.* v. *United States,* 318 F.Supp. 490 (E.D. N.Y. 1970), involving the same Commission order (J.S. App. 7a). The court below noted that in *Long Island* the plaintiff had been found not to have been prejudiced because the plaintiff's request to the Commission for hearing was silent as to any respect in which disclosure of greater detail or cross-examination of the Commission's staff was needed to enable the plaintiff to mount a more effective argument against the proposal; that a different case would have been presented if the plaintiff in *Long Island* had pointed to specifics on which it need to cross-examine or present live rebuttal testimony (J.S. App. 7a).

The court below held that the facts of the instant case "demonstrate that the plaintiffs herein were prejudiced by the summary procedures of the Commission." With respect to FEC, the court pointed out that "FEC sought to disclose a number of deficiencies in the Commission's order by presentation of evidence and cross-examination of the employees of the Commission who directed and prepared the studies relied upon in reaching the Commission conclusions" (J.S. App. 8a). The court, referring to the requests of FEC and Seaboard to the Commission for hearing, concluded "Without

discussing in detail the grounds there urged as requiring hearing, we are of the clear view that these assertions demonstrate the prejudice to Seaboard and FEC arising from the Commission's failure to provide hearings" (J.S. App. 8a).

This dispostion of the case made it unnecessary for the district court to decide other grounds upon which FEC challenged the lawfulness and validity of the Commission's order, and the district court expressly reserved decision on these points (J.S. App. 5a).

SUMMARY OF ARGUMENT

1. Fixing compensation for the use of freight cars under section 1(14)(a) of the Interstate Commerce Act is quasi-judicial action by the Commission. This conclusion is compelled by the nature of the power exercised by the Commission and the character of the Commission's order, the impact of the Commission's action on the carriers, and the language of section 1(14)(a), as amended, in explicitly requiring Commission findings and consideration of carefully enumerated factors as a prerequisite to Commission action. This conclusion is supported by the legislative history of section 1(14)(a), the consistent past practice and interpretation of section 1(14)(a) by the Commission in freight car compensation proceedings, and the decisions of this Court and other courts respecting the scope and nature of the hearing to which parties are entitled under similar circumstances. This Court's decision in *United States* v. *Allegheny-Ludlum Steel Corp.*, U.S. , 40 U.S.L.W. 4664 (U.S. June 7, 1972), concerning application of sections 556 and 557 of the Administrative Procedure Act to a Commission proceeding prescribing car service rules, is not dispositive of this case. *Allegheny-Ludlum* involved

an instance of legislative rule making and not, as here, quasi-judicial agency action.

2. The Commission's denial of FEC's request for oral hearing prejudiced FEC because it denied FEC an opportunity to develop a record to persuade the Commission not to impose incentive charges and a full record for judicial review of an adverse result. The denial was unexplained in the report of the Commission. The subject matter of the testimony FEC proposed to compel from the Commission employees at the hearing is similar to that elicited from Commission employees in freight car compensation hearings during the past 25 years. The evidence FEC proposed to present was relevant to the findings and conclusions section 1(14)(a) requires as a prerequisite to Commission action. The four points FEC expected to establish by the testimony contradicted the basic factual findings the Commission made in this proceeding to justify imposition of incentive per diem.

3. The "restitution" question raised for the first time in the Government's brief is not now before this Court. Assuming reversal, it is premature to consider a final judicial disposition of this action without resolving other substantial issues raised but specifically not decided by the court below. Moreover, the scope of judicial review of the Commission order by the lower court will be determined by the decision of this Court on whether the Commission proceeding is governed by sections 556 and 557 of the Administrative Procedure Act.

ARGUMENT

I. Sections 556 and 557 of the Administrative Procedure Act Govern Commission Proceedings Fixing the Compensation To Be Paid for the Use of Freight Cars

Section 1(14)(a) of the Interstate Commerce Act authorizes the Commission, after hearing, to fix the compensation to be paid for the use of any type of freight car. As amended in 1966, section 1(14)(a) provides that in fixing such compensation the Commission "... shall give consideration to the national level of ownership of such type of car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such element or elements as in the Commission's judgment will [1] provide just and reasonable compensation to freight car owners, [2] contribute to sound car service practices (including efficient utilization and distribution of cars), and [3] encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." Section 1(14)(a), as amended, further provides that the Commission shall not make any incentive element applicable to any type of freight car "the supply of which the Commission finds to be adequate" and that the Commission may exempt any group of carriers from payment of such incentive element or elements "if the Commission finds it to be in the national interest."

The exercise by the Commission of this power to fix compensation for the use of freight cars requires a determination on the record after opportunity for

agency hearing within the meaning of 5 U.S.C. §553 (c), and the provisions of 5 U.S.C. §§ 556 and 557, therefore, govern the proceedings.

1. Section 1(14)(a) confers power to fix the compensation railroads must pay for the use of freight cars owned by others and necessarily the compensation each railroad will receive for the use of its cars by other lines. It includes the power to fix the compensation predicated solely upon costs of ownership and the power to increase the compensation by incentive elements specified in section 1(14)(a) for types of cars the supply of which the Commission finds to be inadequate. *Union Pacific R.R.* v. *United States,* 300 F.Supp. 318 (D.Neb. 1969), *aff'd per curiam,* 396 U.S. 27. The owner, required to release possession of a car to another carrier to further the through movement of freight, may not be deprived of its use without compensation. On the other hand, the carrier using the car is required by sections 1(4), (10), and (11) to accept possession for the purpose of continuing the transportation, and may not be compelled under normal circumstances to pay more than the cost it would have incurred as the owner of the car or by use of its own car. Only under the standards and to the extent specified in section 1(14)(a) may the Commission increase this basic compensation by incentive elements. *Union Pacific R.R., supra* at 323, 326.

At issue is the essential quality of the Commission proceeding under review and the nature of the hearing the statute prescribes. The Commission, as the agent of Congress, must act in accordance with the standards and under the limitations of section 1(14)(a) in prescribing compensation for use of freight cars, including incentive elements. Section 1(14)(a) requires the Commission to determine, as a condition to its action, that

the supply of a type of car is inadequate and the extent to which compensation should be increased "to provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." The discharge of this duty involves the determination of disputed factual issues and the application of the statutory criteria to them. *Incentive Per Diem Charges,* 332 I.C.C. 11, 14-17 (1967), discusses at length the critical factual issues to be resolved in fixing incentive compensation under section 1(14)(a).[6] *Boston & Maine R. R.* v. *United States,* 162

[6] The Commission held *inter alia*:

> Before an incentive element, either interim or long-term, can be added to the per diem charge for the use of any particular type of freight car, we are required to give consideration to the national level of ownership of that type of car and to other factors affecting the adequacy of the national freight car supply. 332 I.C.C. at 14.
>
> Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types. 332 I.C.C. at 15.
>
> . . . Conclusions in this area must rest upon consideration of economic forces, traffic prospects, earnings reasonably to be anticipated, and other factors which enter into the management decision to embark upon a car acquisition program. 332 I.C.C. at 16-17.
>
> . . . At best, these figures [reports of shortages] indicate only that an unsatisfied demand exists in varying degree. Their

F.Supp. 289 (D. Mass. 1958), *appeal dismissed,* 358 U.S. 68, demonstrates the scope and extent of contested factual issues in fixing just and reasonable compensation for use of freight cars. The Commission must act in a quasi-judicial capacity in resolving disputed issues of fact. Compare, K. Davis, Administrative Law Treatise, § 5.01, p. 285, § 7.03, pp. 416-17, § 7.04, p. 422 (1958); Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law,* 1971 Duke L.J. 51, 76-70; Robinson, *The Making of Administrative Policy: Another Look at Rule-Making and Adjudication and Administrative Procedure Reform,* 118 U.Pa.L.Rev. 485, 503-05, 520-23 (1970). Prescribing the compensation to be paid for the use of freight cars is legislative action in the same sense as prescription of future rates. *Prentis* v. *Atlantic Coast Line R.R.,* 211 U.S. 210; *United States* v. *Morgan,* 313 U.S. 409, 417. This Court has consistently held that fixing future rates is a quasi-judicial function and subject to judicial review on the record made before the agency. *ICC* v. *Louisville & N. R.R.,* 227 U.S. 88, 91-93; *Morgan* v. *United States,* 298 U.S. 468. Section 1(14)(a) necessarily prescribes a hearing in authorizing the Commission to fix the compensation to be paid for the use freight cars. The pro-

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probative value is not impressive and, even if they did provide a basis for a finding as to the true gap between current demand for cars by particular type and the extent to which that demand is being met, they also show concurrent surpluses of the same types. No information is presently available as to the extent to which these surplus cars could be used to meet the unsatisfied demand, or the true difference which might be treated as a guide to a present inadequacy in supply. In any event, we must, as heretofore noted, give serious consideration to many other factors affecting the adequacy of the national freight car supply, information which has not yet been developed in relation to the present problem, and with which we may not dispense. 332 I.C.C. at 17.

vision for hearing carries with it fundamental procedural requirements: "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action." *Chicago Junction Case (Baltimore & O. R.R. v. United States)*, 264 U.S. 258, 265.

2. The effect of any Commission order fixing compensation, including incentive elements, on the carriers is both direct and significant. The amount of incentive compensation paid by debtor lines amounts to millions of dollars each six-month period. The basis upon which the compensation is calculated vitally affects both the owning and using railroads and particularly those railroads, such as the FEC, that terminate more traffic than they originate. *Boston & Maine R.R. v. United States*, 162 F.Supp. at 294, 297-98. As the Commission noted in its prior decision in *Incentive Per Diem Charges*, 332 I.C.C. at 13, "Any alteration in the costs of transportation services, any diminution in their availability, produces repercussions throughout the entire structure." The verified statements of FEC in this proceeding establish that FEC paid in 1968 approximately 5-½ percent of its total railway operating revenues for car rental charges and that the additional cost of the prescribed incentive compensation on unequipped boxcars applied over a six-month period would have exceeded the net railway income of FEC in both 1967 and 1968 (App. 115).

Congress was well aware of the potential adverse effect of incentive compensation, particularly on terminating lines. The provision in section 1(14)(a) for

Commission action only after hearing was emphasized during debate on the 1966 amendment to section 1(14)(a) to allay the concern of members of the Congress about the consequences of imposing incentive compensation on these railroads. Mr. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce and floor manager of the bill, assured those members who questioned the effect of the measure on terminating lines that "full hearings" would be held by the Commission before incentive charges were put into effect. Mr. Staggers said:

> MR. STAGGERS: I might say to the gentleman that this will not be put into practice until there have been full hearings before the Commission and all sides have had an opportunity to argue and present their facts on the question. I am certain that if there is discrimination, we will see it. The committee will keep watch over the situation. This will be done only after each side has had an opportunity.
>
> * * * * *
>
> MR. STAGGERS: . . . [T]he committee in its wisdom tried to do the very best it could under the circumstances after the railroads failed to do their job. . . . The chairmen corresponded with them for months in an effort to get them to do something or to come up with some kind of suggestion, which we really did not get. As I said, this will not be put into effect until after complete hearings have been held before the Commission showing the need, and certain groups can be exempted if, in the wisdom of the Commission, such exemptions are needed in the public interest.
>
> 112 Cong. Rec. 9953-54 (1966).

Similar assurances were voiced by the Chairman of the Senate Committee on Commerce during debate on the

proposal in the Senate (112 Cong. Rec. 10250-51). Commission representatives, in proposing section 1(14)(a) be amended to authorize the Commission to require railroads to pay incentive compensation for freight cars, repeatedly testified that great care would be taken in exercising the authority to require incentive compensation and that hearings would be held to determine the facts essential to a decision under the statutory criteria.[7]

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[7] For instance, the then Chairman of the Commission, testifying before the House Committee on Interstate and Foreign Commerce on the bill subsequently enacted by Congress amending section 1(14)(a) to include incentive elements of compensation, said:

> In addition, I would like to point out that no sudden change in per diem charges would be effected by the proposed legislation. Section 1(14) of the act, as proposed to be amended, provides for hearings. The Commission's decision, after hearings, would be subject to judicial review.
>
> Hearings would be necessary in any event to determine, among other things, deficiencies by type of cars and by carriers, and the most equitable means of correcting these deficiencies.
>
> A comprehensive study of traffic requirements, including peak loadings, would be necessary. Separate studies would be required for particular types of equipment, such as box, gondola, flat, hopper, refrigerator, and other special types of cars.
>
> In addition, it would be necessary to consider the type and flow of traffic and the extent to which particular carriers are originating, terminating, or bridge lines.
>
> In fixing the compensation to be paid for the use of freight cars, the Commission would have to determine what basis of compensation would provide a fair return on investment to freight car owners, contribute to sound car service practices, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.
>
> It would be necessary for us to determine whether the compensation should be computed on the basis of elements of ownership costs involved in owning and maintaining freight cars including a fair return on investment, whether compensation should include an element reflecting the value of use of

3. The Commission has consistently held that its proceedings under section 1(14)(a) to fix compensation for the use of freight cars, including incentive compensation, must comply with sections 556 and 557 of the Administrative Procedure Act. In *Incentive Per Diem Charges,* 332 I.C.C. at 14, the Commission held: "Section 1(14)(a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. § 551 et seq." The Commission has always held oral hearings in proceedings to fix compensation for the use of freight cars, both before and after enactment of the 1966 amendment to section 1(14)(a). *Incentive Per Diem Charges, supra; Chicago B. & Q. R.R.* v. *New York, S. & W. R.R.,* 332 I.C.C. 176, 190 (1968); *Increased Per Diem Charge on Freight Cars,* 268 IC.C. 659, 664 (1947); *Rules for Car-Hire Settlement,* 160 I.C.C. 369, 373 (1930); and see *Compensation for Transportation Service,* 332 I.C.C. 554, 555, 562 (1968), *sustained, Southern Ry.* v. *United States,* 306 F.Supp. 108 (E.D. Va. 1969). This present case is unlike that in *Siegel* v. *AEC,* 400 F.2d 778 (D.C. Cir. 1968), where the consistent agency practice had been to provide formal hearings in licensing cases and informal hearings in general rule making proceedings confined to written submissions and non-record interviews. 400 F.2d at 785. The Commission's consistent interpretation and application

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freight cars, or whether it should be fixed upon some other basis or combination of bases.

It would also be necessary to determine whether to prescribe incentive per diem rates industrywide, or to prescribe separate incentive rates for individual carriers by type of car.

Hearings Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., Ser. No. 89-26, at pp. 45-46 (1965). See also, *Hearings Before Freight Car Shortage Subcommittee of Senate Committee on Commerce,* 89th Cong., 1st Sess., Ser. No. 89-23, at pp. 14-15 (1965).

of section 1(14)(a) is entitled to weight in determining whether the proceeding is one governed by section 556 and 557 of the Administrative Procedure Act, and particularly so, in light of the legislative history of the 1966 amendment to section 1(14)(a) outlined above. *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 549-550; *Norwegian Nitrogen Prod. Co.* v. *United States,* 288 U.S. 294, 313-315.

The Commission, in fact, relied on the provisions of sections 556 and 557 of the Administrative Procedure Act in initiating and in deciding this proceeding. The initiating order specifically referred to sections 556 and 557 of the Administrative Procedure Act. Even in the final decision, after abandonment of the procedural plan to assign the proceeding for hearing, the Commission asserted that the procedure employed accorded the parties a hearing under section 556 of the Administrative Procedure Act (J.S. App. 87a).

4. The structure of the Interstate Commerce Act dealing with compensation to be paid by one railroad to another for the use of cars supports the view that Commission action must be predicated on findings made on evidence of record after opportunity for agency hearing. Section 1(14)(a), in terms, provides that the Commission may act only "after hearing." Section 1(15) authorizes the Commission in emergency situations, without notice, hearing or other formal procedure, to make just and reasonable directions with respect to car service, including the use of freight cars, as, in the opinion of the Commission, will best meet the emergency and serve the public interest. Section 1(15), however, expressly provides that the terms of compensation for use of cars during the emergency may be fixed as the Commission "after subsequent hearing

finds to be just and reasonable." This provision, as the former General Counsel of the Commission explained in 1969 to the Senate Subcommittee on Surface Transportation in testimony quoted by the court below (J.S. App. 11a, 14a-15a), makes clear that the determination of the compensation to be paid for the use of equipment, even in emergency situations, requires a hearing. The Commission has held that action under this section requires a determination on the record after opportunity for hearing under the Administrative Procedure Act. *Compensation for Transportation Service, supra* at 555.

Section 1(15) delegates to the Commission separate and virtually unlimited power, unhampered by procedural delays and other predicates of section 1(14)(a) action, to take immediate steps to relieve shortages of equipment, congestion of traffic, and other emergency conditions arising in any part of the country. There is, therefore, no real foundation for a claim (Brief for Appellants at 21-22) that the Commission must be permitted to dispense with the required hearing in order to avoid cumbersome procedural delays or to satisfy some Congressional critics of the Commission.

5. Both the court below and the district court in *Long Island, supra,* held that sections 556 and 557 of the Administrative Procedure Act govern this proceeding. In *Long Island,* the court considered at length the question whether a Commission decision fixing the compensation to be paid for the use of freight cars under authority of section 1(14)(a) was, within the terms of section 553(c) of the Administrative Procedure Act, "required by the statute to be made *on the record* after opportunity for agency hearing." 318 F.Supp. at 495-97; J.S. App. 128a-133a. That court, after reviewing the

purpose of section 553(c) of the Administrative Procedure Act and the interpretation and background of section 1(14)(a) of the Interstate Commerce Act, as amended, concluded that Commission action under section 1(14)(a) was of a character that required Commission determination to be made on the record after opportunity for agency hearing (J.S. App. 128a-133a). The Government on brief urges that this decision is wrong. The Government argues that the phrase "on the record" or some additional word in the statute itself such as "full" modifying the word "hearing" is necessary to bring Commission rule making proceedings under the Interstate Commerce Act within the scope of sections 556 and 557 of the Administrative Procedure Act (Brief for Appellents at 18-19). The distinction now pressed by the Government has never been made by this Court, and it is inconsistent with the prior decisions of this Court construing the Interstate Commerce Act. As early as 1924, Mr. Justice Brandeis rejected the claim that the Commission was free to act in its discretion and without evidence of record when the Act used the phrase "after hearing." *Chicago Junction Case, supra* at 265. In that opinion, Mr. Justice Brandeis pointed out that the phrase "after hearing" in the Interstate Commerce Act had uniformly been held to subject Commission orders to judicial review and, where an essential finding was unsupported by evidence, the order had been declared void. 264 U.S. at 265 n. 9. No distinction was made between orders entered under sections of the Act using the phrase "after hearing" and those containing the phrase "full hearing."[8]

[8] The sections of the Interstate Commerce Act referred to in the *Chicago Junction Case* opinion are: (1) § 15(1) unreasonable rates —"full hearing"; (2) § 15(1) discriminatory rates—"full hearing"; (3) § 1(9) switching connections—"full hearing"; (4)

Mr. Justice Brandeis found support for this result in the distinction made by section 1(15) between the power to issue car service orders under emergency conditions without hearing and the power to fix terms of compensation after "subsequent hearings." 264 U.S. at 265 n. 10.

Differentiating the procedures to be employed by the Commission on the basis of whether the particular section of the Act contains the phrase "after hearing" or the words "full hearing" would produce totally irrational results. For instance, it would mean that railroad rate making proceedings under sections 15(1) and (7) of the Interstate Commerce Act would fall within the requirement for determination on the record after opportunity for hearing, but that no such requirement would apply to proceedings involving motor carrier rate making under sections 216(e) and (g), water carrier rate making under sections 307(b) and (g), and freight forwarder rate making under section 406(e).

6. This Court's decision in *United States* v. *Allegheny-Ludlum Steel, supra,* is not dispositive of the question whether this proceeding is governed by sections 556 and 557 of the Administrative Procedure Act. In *Allegheny-Ludlum,* this Court held an order of the Commission, requiring all railroads to comply with car service rules 1 and 2, to be legislative rule making. 40 U.S.L.W. at 4669. This being so, the Court held that the Commission was not required, either by section 1(14)(a) of the Interstate Commerce Act or the Ad-

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§ 15(6) division of joint rates—"full hearing"; (5) § 5(1) pooling —"after hearing"; (6) § 5(10) railroad control of water carriers—"full hearing"; (7) § 19a(i) valuation of railroad property—"after hearing"; and (8) § 5(2) merger and control of railroads—"after hearing."

ministrative Procedure Act, to make its determination in that proceeding "on the record" after opportunity for agency hearing. 40 U.S.L.W. at 4669.

There is a substantial distinction in the character and nature of the Commission action in *Allegheny-Ludlum* and the proceeding here under review. *Allegheny-Ludlum* dealt with car service rules for the handling, movement, and return of freight cars. In that proceeding, the Commission ordered future mandatory compliance with car service rules the carriers had previously adopted voluntarily but with which some carriers and shippers had not complied. The Esch Car Service Rules Act—now incorporated in section 1(14)(a)—authorizes the Commission after hearing to "establish reasonable rules, regulations and practices with respect to car service...."

The proceeding here under review is of a different nature and the order of the Commission of a different character. This proceeding involves the fixing of compensation for use of freight cars by non-owning railroads under standards specified by Congress. Fixing the compensation to be paid one railroad for the use of freight cars by another railroad necessarily presents issues requiring the exercise by the Commission of a quasi-judicial function. *Palmer* v. *United States*, 75 F.Supp. 63 (D.D.C. 1947); *Union Pacific, supra; Jordan* v. *American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948). Section 1(14)(a) requires performance of such a function by establishing statutory criteria and findings as a prerequisite to Commission action in fixing compensation. The nature of the proceeding and character of the order here under review in respect to procedural requirements are indistinguishable from Commission action in fixing freight rates

(*ICC* v. *Louisville & N. R.R., supra*) or divisions of joint revenue among carriers (*Baltimore & O. R.R.* v. *Aberdeen & R. R.R.*, 393 U.S. 87). The Attorney General's Manual correctly states the application of the Administrative Procedure Act to this Commission proceeding as follows:

> Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after an opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the "record" developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. . . . *Attorney General's Manual on the Administrative Procedure Act* at p. 33 (1947).

The questions presented by this case concern FEC's right to cross-examination and production of testimony relevant and material to the issues required to be decided under the criteria specified in section 1(14)(a). The question is whether FEC was accorded the "hearing" provided by the terms of section 1(14)(a). In this aspect, the present case is unlike *Allegheny-Ludlum, supra.* In *Allegheny-Ludlum,* the Commission had afforded all parties an opportunity to present evidence in written form and had held an elaborate oral hearing for cross-examination and presentation of testimony. 40 U.S.L.W. at 4665. Appellee's claim of procedural error in *Allegheny-Ludlum* was that the Commission had not confined its consideration to matters of record, but had relied on materials outside the record to support its

conclusion to make observance of car service rules mandatory (Brief for Appellee, Association of American Railroads, at 35, *et seq.*). Here, the questions relate to the right of a railroad, required to accept boxcars owned by others and pay incentive compensation for their use, to challenge the factual basis relied upon to impose incentive compensation, through cross-examination and presentation of expert testimony contradicting the factual conclusions expressed in the Commission's interim order.

We conclude that the Commission proceeding is governed by sections 556 and 557 of the Administrative Procedure Act. We next consider whether the Commission's denial of FEC's request for hearing and oral argument prejudiced FEC.

II. The Commission's Denial of FEC's Request for Hearing and Oral Argument Prejudiced FEC

FEC, in compliance with the Commission's order accompanying the interim report, requested oral hearing and oral argument (J.S. App. 44a-48a). The denial of that request prejudiced FEC.

1. FEC requested hearing to compel testimony from the employees of the Commission who supervised and directed the study upon which the Commission relied in reaching its conclusions respecting the adequacy of car supply and testimony of Commission employees experienced in matters affecting national freight car supply.[9]

[9] FEC's request for hearing stated, in part:

> FEC expects at an oral hearing to compel the attendance of those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in

FEC's request to the Commission for hearing, unlike that made by the Long Island,[10] specified four specific, factual matters expected to be established by such evidence. The four points contradicted basic findings made in the Commission's interim report to justify imposition of incentive compensation.

The Government argued in its jurisdictional statement (J.S. 16) and repeated on brief (Brief for Appellants at 26) that the questions FEC sought to have answered through cross-examination of Commission staff were so worded that the Commission "would readily have agreed with" each fact without changing any of its conclusions. This argument is, as the court below correctly held, "wide of the mark." Neither Government counsel nor a reviewing court can know what facts

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Ex Parte No. 252.[19] FEC expects to establish, by cross-examination of such persons, the following facts, among others:

a. Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region.

b. Railroad ownership of additional plain box cars would not necessarily change the results summarized in the appendices to the interim report.

c. No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional box cars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year.

d. It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain box car in all instances.

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[19] A list of such persons will be supplied by FEC as required by Commission procedures in advance of the hearing. (J.S. App. 47a-48a).

[10] The request of the Long Island for hearing upon which the district court decision in that case is predicated appears at pp. 101-05 of the Appendix.

the Commission "would" have agreed with or what conclusions it "would" have reached in the face of such testimony. On brief, Government also argues that it is FEC's burden to demonstrate that the proposed examination and testimony would have "materially" aided the Commission in resolving the issues before it (Brief for Appellants at 24). If the Government is suggesting that the proposed examination and evidence must be relevant to the issues before the Commission, we would agree. If, however, the Government is suggesting that FEC must demonstrate to a reviewing court that the examination and evidence would have compelled a different agency decision, we wholly disagree.

2. The Commission itself did not rest denial of FEC's request for hearing on the ground that the evidence proposed would not, if submitted, change the result or that the evidence would not have materially aided in deciding the issues before it. The Commission's report, in fact, gives no explanation whatever for denying the request for oral hearing. It says only that "No party has been prejudiced by the submission here of all the evidence in written form; and the verified statements and the replies thereto received by this agency accord the parties a hearing under section 556 of that [Administrative Procedure] act" (J.S. App. 87a). This treatment invites *post hoc* rationalization by agency counsel justifying denial of hearing. We submit that, if hearing is to be denied because the evidence proposed to be submitted is immaterial or unpersuasive, the agency itself should express those reasons in its report.

FEC's burden in the reviewing court is not to establish that the evidence it proposed to produce at the oral hearing would have, if received, compelled the agency

to reach a different result. FEC is entitled to a fair opportunity to develop a record for persuading the Commission not to impose incentive charges and for judicial review of an adverse result. FEC met its burden by showing that the procedure precluded FEC from presenting relevant and material evidence in support of its position in oposition to incentive compensation charges. Or, as both the court below and the district court in *Long Island* held, prejudice is shown by demonstrating that the "disclosure of greater detail or cross-examination of the Commission's staff was needed to enable it to mount a more effective argument against the Commission proposal" (J.S. App. 7a, 136a). We shall demonstrate in this section of the brief that the examination and evidence proposed by FEC was relevant to the proceeding.

3. A further preliminary issue requires comment before turning to a discussion of the relevancy of the examination and evidence FEC proposed to compel under subpoena. The Government now asserts that FEC can not, in any event, cross-examine Commission staff employees since to do so would probe the mental process of the Commission and disrupt the internal working of the agency and the integrity of the administrative process (Brief for Appellants at 25-26). This argument, advanced for the first time on brief in this Court, is best contradicted by the Commission's own past practices. FEC's request for hearing specified that Commission employees who had testified respecting freight car supply problems in prior proceedings would be subpoenaed. In both Ex Parte 252 and Ex Parte 241, Commission counsel presented Commission employees for cross-examination in support of the written statements and studies they had submitted for the record in those

proceedings. 332 I.C.C. at 12. Testimony from similar staff employees and agents was also submitted in support of increased per diem charges in *Increased Per Diem Charge on Freight Cars,* 268 I.C.C. 659, 664 (1947). The employees proposed to be cross-examined are not Commissioners or confidential staff assistants of the individual Commissioners who participated in the decision-making process. They are field agents, data assemblers, and car supply directors employed by the Commission. They prepared the statistical study and the field audits to which the Commission referred as providing the factual basis for the conclusions expressed in the interim report (J.S. App. 62a-70a, 88a-91a). The testimony was to come from employees of the Commission whose experience and duties involved familiarity with the problems of movement and supply of freight cars on a national basis. FEC did not propose to probe the mental processes of the Commission; it proposed to illuminate the record by exposing the bases of the statistical studies and by presenting expert opinion contradicting the factual conclusions expressed in the interim report.

4. In the context of the proceeding and in the light of the findings expressed by the Commission, the testimony and cross-examination FEC sought was material and relevant to the agency determination under section 1(14)(a). The interim report of the Commission (J.S. App. 51a) proposing imposition of incentive per diem charges depended upon a conclusion that a nationwide shortage of unequipped boxcars exists during the six-month period September through February of every year. A study attached to the interim report prepared by the staff of the Commission was the basis for this conclusion. The study was based upon periodic reports

filed during 1968 by individual railroads on data sheets designed by the Commission's staff. The individual reports listed by station for selected dates the number of cars requested by shippers to be placed for loading, the number actually placed, and the number of empties at that station and at other stations on the reporting railroad. The study summarized the data by six geographic zones. The study claimed both a failure to fill shipper orders for plain boxcars (a deficiency) and, at the same time, a large surplus of empty plain boxcars within the same geographic zones (J.S. App. 68a). The Commission asserted that improved efficiencies in use, movement, and return of boxcars would not, in its judgment, eliminate reported deficiencies during the winter months (J.S. App. 69a-70a). The Commission concluded that shortages "probably" could be relieved only by an increase in the total number of plain boxcars (J.S. App. 70a). The Commission concluded that the imposition of incentive per diem charges "should tend" to speed up the use, movement, and return of foreign cars, produce a flow of funds for creditor roads to purchase needed equipment, and "might tend" to encourage acquisition of additional boxcars by carriers in every part of the country (J.S. App. 54a). The final report of the Commission adopted these findings and conclusions of the interim report (J.S. App. 88a).

The testimony FEC sought to compel would have tested the validity of the study upon which the Commission relied and established facts contradicting the Commission's assumptions relating to car supply.[11]

[11] The Chairman of the Commission testified that the validity of the conclusions expressed in the staff study presented to the Senate Subcommittee in May 1969 ". . . must be tested against other evidence that will be received in the course of the hearings." *Hear-*

The testimony could not have been presented by FEC as a part of its written presentation because the information was in the possession and knowledge of the Commission's employees proposed to be subpoenaed.

a. FEC proposed to demonstrate through the Commission staff that the "deficiencies" in furnishing boxcars, reported by the individual railroads and tabulated in the study upon which the Commission relied to make the essential finding of inadequate car supply, may not be affected by the number of boxcars owned by the railroad or by any regional group of railroads. The reports completed by the railroads required each railroad to show as a "deficiency" the failure to supply a car on the day requested by the shipper no matter when the request was received (J.S. App. 65a, 67a). For example, a request received at noon for a boxcar that same day would produce a reported deficiency unless the car was supplied that day (J.S. App. 66a-67a). Train schedules and switch engine crew assignments may, and frequently do, prevent placement of a car upon short notice even at locations served every day regardless of the availability of empty cars (App. 124-25). Many

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ing Before Subcommittee on Surface Transportation of Senate Committee on Commerce, United States Senate, 91st Cong., 1st Sess., Ser. No. 91-8 (1969). The Commission had earlier expressed reservations about the sufficiency, relevancy, and materiality of the data collected under its order of December 26, 1967 initiating this proceeding. By order served January 24, 1969, the Commission revised the data sheets to be completed by all railroads because, according to the order, "as a result of the processing and a preliminary analysis, the data submitted by the carriers as referred to hereinabove [covering the year 1968], certain revisions and refinements appear desirable in order to insure that the record herein shall contain sufficient, relevant, and material facts and information upon which the Commission can base a determination of the issues involved" (App. 65). The data collected pursuant to this order has never been compiled and released by the Commission.

branch lines are served only once or twice a week, but a request for a boxcar on a day that no service was scheduled would also be recorded as a deficiency. FEC proposed to show, therefore, that the reported "deficiencies" tabulated in the study were the result of train service schedules rather than lack of cars and that reported deficiencies may not be affected by the supply of cars available at a station, on a railroad, or in a statistical region. The record as made before the Commission suggests that the number of reported deficiencies because of train schedules was quite substantial.[12] Although the Commission's Bureau of Enforcement conceded that orders for car placements on a day when no service was scheduled should not have been counted as orders for cars on that day,[13] such "deficiencies" were not excluded from the reports or the study. In the absence of the requested cross-examination, there was no way to determine whether, or to what extent, the reported deficiencies were the result of inadequate car supply or service factors unrelated to car ownership. The importance of this showing, both in terms of the Commission proceeding and of judicial review of the Commission's decision, is emphasized by the Commission's reliance on any reported "deficiency" in placing cars as evidence that the railroads owned an inadequate number of plain boxcars (J.S. App. 89a).

b. FEC also proposed to present, on this issue, testimony of Commission car service experts to show that reports of "deficiencies" such as those used in the

[12] The record in the proceeding now shows, for example, that 25 to 30 percent of all stations on the Penn Central are served on less than a daily basis and that this fact affected the deficiencies reported by that railroad (App. 156-57).

[13] Bureau Reply Brief, p. 7 (App. 190).

staff study are substantially affected by shipper practices of over ordering cars or placing duplicate orders with two or more railroads, particularly during the fall and winter grain harvest in the Midwest.[14] FEC proposed further to cross-examine the service agents upon whom the Commission relied to conclude that the reports were free of any "duplication or inflation in the car orders reported" (J.S. App. 65a-66a). The accuracy of this conclusion is important because inflated, duplicative, or repetitious orders for cars drastically distort the number of reported shortages and deficiencies. The requested cross-examination would have disclosed whether the agents took into account the fact that shippers frequently "cancel" orders only after the day the cars are to be placed. Only cross-examination would have disclosed how, if at all, the Commission agents auditing carrier A could determine that shippers had not

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[14] Howard S. Kline, Chief of the Open Car Branch, Section of Car Service, Bureau of Railroad Safety and Service of the Commission, had stated under cross-examination in 1966:

> Q. You have indicated that you know, then, of a practice of shippers to order more cars than they actually need, to request the carrier to place more cars than they actually need, under such circumstances.
>
> A. Yes.
>
> • • • • •
>
> Q. Could you test it perhaps by a sampling procedure to deal with the shippers themselves, and compare their actual shipments over a period of time with their placing of orders for the placement of cars?
>
> A. No, because I do not think there is too much connection between the car shortages as reported by shippers, and their shipments. Our men have turned in reports any number of times of elevator men with plugged elevators, that had a siding that would hold five cars, and still they are ordering 20 cars a day. What would they do with the other 15?
>
> (Transcript of Hearings on November 2-3, 1966 in Ex Parte 252, pp. 167, 275-276)

placed duplicating orders with carrier B. The presentation of testimony from Commission experts respecting such practices, as well as cross-examination of the auditors, was neither frivolous nor without reasonable foundation.[15] In Ex Parte No. 241, *Investigation of Adequacy of Freight Car Ownership,* 335 I.C.C. 264 (1969), the parties unanimously agreed, and the Commission found, that the reported car shortages in that proceeding had to be reduced *at least 50 percent* to compensate for over ordering by shippers (335 I.C.C. at 305-306).

c. FEC requested hearing to prove, through Commission staff experts, that acquisition of additional plain boxcars would not necessarily alleviate reported national shortages and deficiencies. FEC presented the evidence in its possession that increases in the number of plain boxcars would only exacerbate the imbalance of empty plain boxcars on FEC's line, resulting in decreased efficiency in car utilization and increased incentive per diem obligations (App. 125). FEC proposed to show, through the testimony of Commission staff members with long experience in freight car service matters, the extent to which inefficient car utilization on a national basis would be a likely product of increased car supply. This evidence was directly relevant to the statutory duties of the Commission under section 1(14)(a) of the Act. Section 1(14)(a) authorizes imposition of incentive compensation only if the Commission finds

[15] The study attached to the interim report makes contradictory claims as to the extent to which the data is affected by over ordering and duplicate orders. Based on the field audits, the study asserts that the reports were 91.7 percent free of duplication or inflation (J.S. App. 65a). Yet, the study also claims the figures are demonstrated to be 99.1 percent free of duplication (J.S. App. 66a). A seven percent error destroys the validity of underlying data for the purposes of this proceeding.

such charges, among other things, "will . . . contribute to sound car service practices (including efficient utilization and distribution of cars). . . ." The only basis the Commission, as proponent of the rule, offered in its report to satisfy its statutory burden of finding that more efficient car utilization and distribution would evolve was an expression of conditional, qualified hope that incentive charges "may," "should," "might" produce this desired result (J.S. App. 54a, 57a). But, in the end, the Commission had to concede that it did not know whether incentive per diem would work at all (J.S. App. 61a). The tack the Commission took in its final report concerning the effect of incentive per diem was simply to shift the evidentiary burden from the Commission as the proponent of incentive compensation to respondent railroads. The Commission held:

> No evidence was produced by these parties beyond the opinions of certain railroad officials . . . that the proposed scale would be ineffective as an incentive. (J.S. App. 92a)

This conclusion by the Commission underscores the prejudice FEC sustained when the Commission refused an oral hearing at which FEC proposed to present the testimony of non-railroad witnesses on these critical issues.

d. FEC had reasonable grounds to believe that Commission staff members experienced in freight car supply problems would have testified that the statistics summarized in the interim report were insufficient to support a determination as to what constitutes an adequate car supply or how many additional general purpose boxcars were needed to remedy deficiencies found to exist. Mr. Howard S. Kline, the Commission's expert on freight car supply, had testified in another proceeding that a supply of cars adequate to furnish all shippers cars within 24 hours of their request would be so

large that rail traffic would come to a standstill from the resulting congestion (Transcript of Ex Parte 241 Hearings, pp. 1235-36). The Commission, in effect, reached the same conclusion in the 1967 decision in Ex Parte No. 252 (322 I.C.C. at 13). Yet, the standard applied by the Commission in this proceeding was even more stringent—the ability or failure of railroads to place cars for loading at the time requested even if the request for service was made on the same day (J.S. App. 89a).[16] FEC had reason to believe that responsible staff members of the Commission would have testified that it is unreasonable to measure the adequacy of freight car supply, particularly in periods of heavy grain harvests, by the ability of railroads to furnish plain boxcars upon request regardless of how peremptory the request.[17] Responsible officials of the Commis-

[16] The preliminary staff analysis of the 1968 freight car study presented to the Senate Subcommittee on Surface Transportation, mentioned in the Commission report (J.S. App. 90a n. 4), contains a summary of some, though not all, of the underlying data. This summary indicates that there was a daily average of 18,666 orders for unequipped boxcars in 1968, 60 percent of which were for placement on the day the order was received by the carriers. *Hearing Before Senate Subcommittee, supra* at 40, 88, 96.

[17] The study furnished to the Senate Subcommittee on Surface Transportation observed with reference to this point that:

> Reliance on these statistics for a measure of the extent of any inadequacy of car supply, of course, involves an assumption that it is reasonable to require the railroads to fill every order on the day for which the cars are requested and that a shipper who requests prompter service, no matter how peremptory that request may be in relation to the demands of all shippers for the same type of car, is entitled to such service. This assumption may be unwarranted, and the study provides data by means of which allowance can be made for the effect of the assumption. *Hearing Before Senate Subcommittee, supra* at 12.

No such allowance was made. Indeed, the data relied upon by the Commission in its interim report discloses nothing with respect to the lead time allowed to supply cars.

sion had repeatedly testified at other times and in other proceedings that a service standard requiring placement of cars upon 24 hours' notice was unreasonable and particularly so during harvest time (*E.g.*, Transcript of Ex Parte 241 Hearings, pp. 356-358, 1324-36; Transcript of Ex Parte 252 Hearings, pp. 256-257). The acquisition and maintenance of a "car supply adequate to meet the needs of commerce" is, under section 1(14)(a), an essential part of the standards for Commission imposition of incentive per diem. Evidence as to the reasonableness of the standard applied by the Commission to measure adequacy of car service is directly relevant to the statutory authority under which the Commission acted.

III. Further Proceedings Required in the District Court in the Event of Reversal

The brief for the Government specifies as the third question presented whether the FEC should be ordered to "make restitution of the incentive per diem charges [it] would have paid but for the order of the court below...." (Brief for Appellants at 2). The brief for the Government answers the question in the affirmative assuming, of course, reversal of the judgment of the court below (Brief for Appellants at 28-30).

1. The "restitution" question was not raised in the jurisdictional statement. There is, therefore, some doubt, in view of Rule 40(1)(d)(2) of this Court, whether the Government may now raise the question.

2. In any event, the question is premature. FEC, as well as Seaboard Coast Line Railroad, raised a number of substantial issues as to the validity of the order of the Commission upon which the district court expressly

reserved decision. The opinion of the district court states:

> Seaboard, in its attack upon the actions of the Commission, alleges (1) that the Commission failed to afford it a proper hearing and that such failure prejudiced Seaboard, (2) that the Commission failed to comply with the requirements of Section 1(14)(a) of the Act, and (3) that the Report and order of the Commission does not contain reasons and findings sufficient to support the Commission's conclusions. FEC joins in Seaboard's arguments that it was improper for the Commission to act without further hearings and that the Commission's conclusions are not based on substantial evidence, and also adds the contentions that (1) the Commission's order is so unreasonable as to deny due process and (2) that the Commission should have exempted FEC from incentive per diem payments. Since we find that the Commission acted illegally in denying the plaintiff railroads a hearing before the imposition of the incentive per diem charges, we pretermit discussion of all but the first point. (J.S. App. 5a)

This Court does not perform the initial judicial review of orders of the Interstate Commerce Commission; that function is performed by statutory three-judge district courts. This Court acts on appeals from judgments of statutory three-judge district courts and does not undertake initial review of issues not considered or disposed of by the court below. The general practice in cases where the judgment of a district court is reversed on limited issues is to remand the case for further proceedings in the district court. *E.g., Seaboard Air Line R.R.* v. *United States,* 382 U.S. 154.

3. FEC is entitled to judicial review of the substantial issues raised by the pleadings and not resolved by

the district court. This review should initially be undertaken by the district court. The scope of that review will be affected by a decision that, in fixing compensation to be paid for freight cars, the Commission is not required by section 1(14)(a) to give FEC opportunity for cross-examination or presentation of witnesses. FEC is entitled to a hearing on its claims at some point in this compensation proceeding. *Jordan* v. *American Eagle Fire Ins. Co., supra* at 288-90. Judicial review of freight car compensation orders of the Commission normally is limited. *Union Pacific R.R.* v. *United States, supra* at 323; *cf., Allegheny-Ludlum,* 40 U.S.L.W. at 4669. If, however, Commission action is not required to be made on the record after opportunity for agency hearing, FEC is entitled to a trial *de novo* in the district court on the reasonableness of the order. *Cf., Jordan* v. *United Ins. Co. of America,* 289 F.2d 778 (D.C. Cir. 1961). Trial *de novo* in the district court is contemplated by section 706(2) of the Administrative Procedure Act in these circumstances. Senate Comparative Print, June 1945, p. 20 (Senate Judiciary Committee Print, Administrative Procedure Act, Legislative History, Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 39-40 (1946)); H.R. Rep. 1980, 79th Cong., 2d Sess., p. 45 (1946) (Sen. Doc. No. 248, p. 279).

If the judgment of the court below is reversed, the appropriate procedure is to remand the case to the district court for further proceedings, including an initial determination of whether the equitable doctrine of restitution requires payment by FEC of incentive compensation for any past period of time.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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